United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

PETITION FOR REHEARING IN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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For the
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FILED DEC 24 1957

Joseph W. Stewart
CLERK

No. 13,793

MARY W. GOLDEN,
Appellant,

v.

GLENS FALLS INDEMNITY COMPANY,
Appellee

727

No. 13,801

GLENS FALLS INDEMNITY COMPANY,
Appellant,

v.

MARY W. GOLDEN,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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PETITION FOR REHEARING IN BANC

Comes now the petitioner, Mary W. Golden, by her attorneys, and moves this Court to grant a rehearing of this matter before the Court in banc. This Court has the power to grant such rehearing. United States Code, Title 28, Sec. 46(c). It is respectfully submitted that the issues summarized below are most appropriate for consideration by the full Court.

STATEMENT OF CASE

A division of this Court affirmed a judgment of the lower court which established a lien in behalf of Glens Falls Indemnity Company (a judgment creditor of petitioner's deceased husband) to premises 6404 9th Street, N.W., Washington, D.C., the home of the petitioner, which had been acquired by the husband and petitioner as tenants by the entirety.

The husband was executor of an estate and between April 5, 1948 and August 21, 1953, misappropriated the net sum of $25,075.47 (J.A. 16, 17); the surety made good the defalcation, secured a judgment against the husband, then brought suit against the husband and your petitioner and sought, in said suit, to establish a lien upon the residence purchased by the deceased husband and the petitioner as tenants by the entirety. (J.A. 16). The husband has since died. Both the husband and his wife contributed to the purchase price of said property (J.A. 18); your petitioner, Mary Golden, from her personal funds paid, at or about the time of settlement, the sum of $5,659.00 (Our Brief p. 3), and she likewise paid from her personal funds a substantial amount of the payments which became due on the first trust. The lower court found that $3,434.78 contributed by the husband could be traced as a part of the proceeds of the misappropriations committed by him (J.A. 17), and said court decreed a lien against said property in said sum (J.A. 29).

Petitioner was innocent of any wrongdoing on the part of her husband and did not learn of his misappropriations until this suit was filed on March 11, 1955 (J.A. 44-45). The lower court stated (J.A. 45) that there was no proof of fraud or of knowledge on the part of the petitioner as to the source from which the husband obtained the money that he put in the property.

Though repetitious, yet as this is the heart of our case, we repeat that the petitioner did, from her own funds, make substantial payments

on account of the house, and she was without knowledge of the misconduct of her husband--this statement is not in controversy, and the Court so found.

The lower Court and the Division of this Court seem to misunderstand "tenancy by the entirety"; they hold that "his interest" (speaking of the husband) may be carved out of the whole and may be subjected to a lien, even after his death, when the law is that the surviving spouse is entitled to the whole.

I.

The Decision Holds That the Husband, One of the Tenants by the Entirety, has a Distinct Interest Which May be Subjected to a Lien; This Holding is in Conflict with the Well Established Law in the District of Columbia

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This Court has recognized "tenancy by entirety" and the rights, privileges and burdens that go with it. Instantly, upon the death of one tenant, the survivor can exercise all of the rights of an owner in fee simple, whereas before, he was limited to use and possession with contingently effective powers, yet all this is attributed to the original grant. Death is the mere contingency which makes it effective; all that death does is to free the estate from the decedent's partipation; the survivor acquires no new estate but continues merely to hold and be possessed of the entirety from the date of the original grant. Fairclaw v. Forrest, 76 U.S. App. D.C. 197, 199, 130 F. 2d 829 (1942).

The consequence of tenancy by entirety was a union of husband and wife in the estate so that neither could dispose of any part without the assent of the other; there are obvious advantages of tenancy by the entirety which can be attained by no other form of tenancy; it is a mode of protecting one spouse from the other's improvident debts; the rights

of each spouse are equal to the other's and superior to the rights of "persons who claim through the other spouse." Fairclaw v. Forrest, supra, p. 201. The rule of inalienability is founded on the protection of one spouse against the creditors of the other.

A judgment against the husband is not a lien on land held as tenants by the entirety. American Wholesale Corporation v. Aronstein, 56 App. D.C. 126, 10 F. 2d 991 (1926); also see Jordan v. Reynolds, 105 Md. 288 (1907). At the time of the original grant, each party received these rights. Had the husband survived, the whole property would have passed to him and the surety could have levied upon it to the exclusion of any claim by Mrs. Golden's estate; and, by the same token, upon the husband's death, Mrs. Golden took the property clear and free of claims of Mr. Golden's estate and free of claims of his creditors.

II.

The Decision Relies Upon a Florida and a Michigan case; there the Facts are Totally Different from the Facts in the Instant Case and these Cases are Inapplicable.

In Wilkins et al. v. Wilkins et al., 144 Fla. 590, 198 So. 335, (1940), relied upon by the Court, bonds were wrongfully converted by the husband, the proceeds were placed in his account, were then transferred to the wife's account and were drawn from her account to make payment on the real estate. The opinion does not indicate that the wife made any payment whatsoever from her funds, nor does the opinion indicate the wife contended that she was a purchaser for value. Further, there the plaintiffs were not judgment creditors but were seeking to trace the funds; they had made no election of remedies.

In Long v. Earle, 277 Mich. 505, 269 N.W. 577 (1936), (relied upon by the Court) trust funds were embezzled by the husband and invested in real estate, title to which was taken in the names of the

husband and wife as tenants by the entirety. There was no contention that the wife made any contribution to the purchase price; at page 524 the Court states that Florence C. Earle (wife) was a mere volunteer to the taking of title,

> "There is no showing upon this record the money paid for this real estate belonged to Florence C. Earle."

This opinion supports the position of instant Petitioner, for the Court continued, pp. 524-525, that when funds are taken by a trustee and pass to a third person,

> "who is a mere volunteer, then the rule is universal that such voluntary transferee acquires and holds the property subject to the same trust which before existed * * *."

At page 525 the Court stated that the fund can be traced

> "* * in the absence of a claim of bona fide ownership by a third person * *".

It is respectfully, but earnestly urged, that the two cases relied upon do not support the Court and that the Michigan case gives Petitioner strong support.

III.

The Decision Destroys the Protection Afforded a Surviving Spouse and Enlarges the Relief Afforded a Judgment Creditor of the Deceased Spouse.

The doctrine that an estate by entireties is preserved to the surviving spouse free from claims of the creditors of the other spouse is one of almost universal acceptance. Fairclaw v. Forrest, supra; Muskegon Lumber & Fuel Co. v. Johnson, 338 Mich. 655, 62 N.W. (2d) 619 (1954); Hunt v. Covington, 145 Fla. 706, 200 So. 76, 77 (1944).

In the instant case the Roberts Estate exercised its right of election, and, rather than following the trust property, chose to hold the trustee personally liable for the breach of his trust by taking a judgment against him and the surety. Oliver et al. v. Piatt, 3 How. 333, 401, 44 U.S. 333, 401 (1945); General Petroleum Corp. v. Dougherty, C.C.A. 9, 117 F. (2d) 529, 539 (1941). The Roberts Estate waived its alternative choice to pursue the trust property. Bliss v. Collier, 232 Mich. 221, 205 N.W. 81 (1925). When the surety paid the judgment it became subrogated only to the rights of action the beneficiary estate had against the trustee. Even if the surety did have an independent right of election, it exercised it by choosing to hold the trustee personally liable by taking a judgment against him personally. Therefore, no matter how ensconsed in form of tracing trust funds, the surety is, in substance, attempting to establish a lien against property owned by the wife in order to satisfy a judgment obtained against the husband.

IV.

Stolen Funds Cannot be Traced into the Hands of a Bona Fide Purchaser for Value

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It is clearly established that when a trustee has been guilty of a breach of trust and has transferred the property, the cestui que trust has the right to follow the property into the hands of such third party, unless he is a bona fide purchaser for value. Oliver et al. v. Piatt, supra; Moore v. Crawford, 130 U.S. 122 (1889).

Mrs. Golden, at the time of the original grant, was innocent and paid value for her interest in the tenancy by the entirety; each tenant then took vested rights. "Father Time" determined which one should finally take the full estate free of the claims of the creditors and of the heirs of the other.

Neither had a separate estate which could be carved out of the whole and be subjected to a lien of a judgment creditor of that one tenant. Such a construction gives Mrs. Golden less than she purchased.

Had Mrs. Golden predeceased her husband, would the surety, judgment creditor, concede that her estate had any interest in the property?

CONCLUSION

This decision (1) carves out of a tenancy by the entirety a separate "interest" in the husband which it subjected to a lien, and (2) it holds that an innocent party who pays value to participate as an owner in a "tenancy by the entirety" does not take by the original grant the right upon surviving to receive the entire estate free of claims of a surety (judgment creditor).

These changes in our law are drastic and will adversely affect the tremendous number of families holding title to their homes as tenants by the entireties.

It is respectfully suggested and urged that the Courts' discretion be exercised by granting a rehearing in banc.

Respectfully submitted,

Francis W. Hill

William F. Becker

601 Tower Bldg.,
Washington, D.C.

Attorneys for Petitioner,
Mary W. Golden

CERTIFICATE OF GOOD FAITH

It is hereby certified that the Petition is presented in good faith and not for delay.

Francis W. Hill

William F. Becker

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing in Banc has been mailed, postage prepaid, to Edward Gallagher, Esq., and Robert M. McChesney, Jr., Esq., Wyatt Building, Washington 5, D.C., attorneys for appellant, this _____ day of December, 1957.

William F. Becker

BRIEF FOR MARY W. GOLDEN, AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EX 3-0625

QUESTIONS PRESENTED

In the opinion of Mary W. Golden, the following questions are presented:

1. Whether a wife, who makes substantial contributions from her personal funds toward the purchase of a home with her husband as tenants by the entireties and is absolutely innocent of any wrongdoing on his part, is an innocent purchaser for value of such property so as to stop the tracing of funds misappropriated by her husband from an estate into that property and impressing it with a lien therefor.

2. Whether there was sufficient evidence of the subsequent purchase by the wife of her husband's interest in property previously held by them as tenants by the entireties, to require the court to find, she was an innocent purchaser for value of her husband's interest.

3. Whether the guarantor, on a bond for the faithful performance of the duties of an executor of an estate, which took no action to supervise or inquire into the executor's performance for a period of over five years, during which time he misappropriated over $25,000.00 therefrom, is barred from obtaining a lien against property owned by the innocent widow of the deceased executor.

4. Whether the first withdrawals from an account in which one mingled misappropriated funds with his personal funds are considered to be from the latter while such funds last, and, therefore, whether the lower court improperly computed the amount of misappropriated funds traceable into property involved herein.

5. Whether reimbursements to an estate from which misappropriations were made previously and also subsequently should be credited against the misappropriations in priority of time, beginning with the earliest misappropriation.

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2. Whether there was sufficient evidence of the subsequent purchase by the wife of her husband's interest in property previously held by them as tenants by the entireties, to require the court to find, she was an innocent purchaser for value of her husband's interest.

3. Whether the guarantor, on a bond for the faithful performance of the duties of an executor of an estate, which took no action to supervise or inquire into the executor's performance for a period of over five years, during which time he misappropriated over $25,000.00 therefrom, is barred from obtaining a lien against property owned by the innocent widow of the deceased executor.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR MARY W. GOLDEN

JURISDICTIONAL STATEMENT

Appeal No. 13,793 is from a judgment of the District Court dated January 30, 1957, which gave Glens Falls Indemnity Company a lien on real estate owned by appellant known as Lot 4, Square 2975, and improvements thereon known as 6404 Ninth Street, Northwest, in the District of Columbia, in the amount of $3,434.78. Jurisdiction was conferred on the lower court by the District of Columbia Code

(1951 edition) Secs. 11-305 and 11-306. Jurisdiction is conferred on this Court by the provisions of Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

Theodore T. Golden qualified as Executor under the Will of one Bertha M. Roberts on March 12, 1948, giving a bond for the faithful performance of his duties as executor. (R. 180; J.A. 11). The Glens Falls Indemnity Company signed this bond as surety. (R. 180; J.A. 11). It was adjudged by the United States District Court in the matter of the Roberts' estate, Administration No. 70431, that between April 5, 1948 and August 24, 1953, Theodore T. Golden made withdrawals from that estate and devoted these funds to his own personal use, depositing them to his personal account at the American Security & Trust Co. The total of these withdrawals was $29,644.00 (R. 181; J.A. 11).

Theodore T. Golden was removed as Executor on November 10, 1953. (R. 181; J.A. 11). He was entitled to credits against the shortage in the amount of $4,568.53 as follows: (R. 185; J.A. 15).

Bequest	$1,000.00
Repayments	
Aug. 1, 1949	1,065.00
Aug. 5, 1949	2,500.00
Oct. 20, 1953	3.53
	$4,568.53

These credits reduced the shortage to $25,075.47. (R. 181; J.A. 11). A judgment was entered against Theodore T. Golden and the Glens Falls Indemnity Co. for the sum of $25,709.37 with interest at six percent from December 8, 1953. The surety paid this judgment, which with the interest, amounted to $27,005.29, and was awarded judgment against Theodore T. Golden in that amount, plus interest at six percent. (R. 181; J.A. 11).

Theodore T. Golden married Mary W. Golden on November 12, 1947. (R. 181; J.A. 12). At the time of the marriage, he was solvent and she had separate assets of approximately $11,471.00. (R. 181; J.A. 12; Pl. Ex. 1). On or about June 6, 1948, Theodore T. Golden and Mary W. Golden contracted to purchase a house in the District of Columbia and took title thereto as tenants by the entireties by deed dated July 6, 1948. (R. 183; J.A. 13). The total purchase price, including settlement charges, was $19,093.78, as follows:

Deposit with Contract	$750.00, paid by Theodore Golden
Payment to settle	5,343.78, paid by Theodore and Mary Golden
Second Trust	3,000.00, later paid by Mary Golden
First Trust	10,000.00, payments by Theodore and Mary Golden. (R. 183;J.A. 13).

Of these amounts, the $750.00 deposit was paid by Theodore Golden on June 6, 1948. (R. 183; J.A. 13). On June 7, 1948, he deposited $2,615.00 in his personal account, bringing his total balance to $2,765.96. (Pl. Ex. 1). On the following day, the account of the Roberts' estate was debited $2,500.00. (R. 185;J.A. 15).

As to the payment of $5,343.78 to settle, Mary Golden contributed $1,300.00 on the settlement date, July 6, 1948, (R. 107) and $1,359.00 at a later date, or a total of $2,659.00. (R. 105, 109-110, 183; J.A. 52).

Mary Golden paid the $3,000.00 second trust entirely. (R. 183; J.A. 13).

Theodore Golden physically made the payments on the first trust between the dates July 27, 1948 and August 26, 1953, at the rate of

$75.00 a month, totalling $4,500.00, of which $2,540.76 was applied to principal and $1,959.24 was applied to interest; (R. 113-114; J.A. 54 Pl. Ex. 2); during this time, he also paid the tax and heat bills, but did not make contribution to any other expense of operation of the house, or buying food and supplies. (R. 114-115; J.A. 53-54). During the same period, Mary Golden paid $2,197.35 of her own funds on the first trust and paid all of the expenses of operating the home except as above stated. (R. 115; J. A. 54). After August 26, 1953, all payments on the property were made by Mary Golden alone. (R. 115; J. A. 54).

In order to carry on the home and help pay the first trust, Mary Golden moved into the basement, rented rooms and conducted a seamstress business. (R. 81, 182; J. A. 45, 12). From October, 1953 to June, 1954, she received from Theodore Golden only $900.00, at the rate of $100.00 per month for his room and board, and he contributed nothing else for family support or maintenance of the home. (R. [illegible], 116-117; J. A. [illegible], 54-55).

On or about January 30, 1947, prior to her marriage to Theodore Golden, Mary Golden purchased stock of Golden Distributors Company, an oil company, from him for which she paid $3,000.00. (R. 98, 103; J. A. 50, 51; Def. Ex. 2A, 2B, 2C, 3). Theodore Golden agreed when he sold her the stock that, at her request, he would repurchase the stock from her at the price she paid for it. (R. 77, 166; J. A. 44, 9). At a subsequent date, Mary Golden sold the stock back to Theodore Golden who paid for it by deeding his interest in the property herein to her through a straw party on February 1, 1952. As additional consideration, Mary Golden cancelled all the loans she had made him. (R. 77, [illegible], 86-87, 88, 112, 183, 166-167; J. A. 44, [illegible], 47-48, 53, 13-14, 8-10).

Theodore Golden was obsessed with the conviction that his company, Golden Distributors Company, would drill a producing oil

or gas well in Kentucky. (R. 71-72, 83, 85; J.A. 43, 46, 47). He drilled a number of wells. (R. 72; J. A. 43). He spent far more money in these operations than he took from the Roberts' estate. (R. 91-92; J.A. 49 ; Def. Ex. 1). He stated this was where all the money taken from the estate went and that none of it went into clothes, luxuries or the property involved herein. (R. 72, 85, 95; J.A. 43, 47, 50).

Mary Golden was absolutely ignorant of Theodore Golden's misappropriations and wrongdoings and did not learn of it until she was served with process in this action. (R. 78-79; J.A. 44-45). The Court found there was no knowledge on her part as to the source from which Theodore Golden obtained whatever money he put into the property. (R. 79, 125; J.A. 45, 18).

On March 11, 1955, the Glens Falls Indemnity Co. sued Theodore T. Golden and Mary W. Golden, praying (1) for a judgment in the amount of $20,000.00 with interest, (2) a decree that the 9th Street property was held in trust for it, (3) an order directing transfer of the property to a receiver for sale, (4) the proceeds of the sale to be applied toward its judgment against Theodore Golden and to any judgment against Mary Golden, and for such other relief as the Court deemed proper. (R. 156-159; J.A. 1-4).

Theodore Golden died on August 3, 1955. (R. 168). The administrator of his estate was substituted as a defendant. (R. 186).

Trial was had without a jury before the Honorable Judge Alexander Holtzoff on January 17 and 18, 1957. (R. 1-127). On January 18, 1957, the Court denied the motion of defendant, Mary Golden, for judgment at the close of the plaintiff's case. (R. 66). On January 22, 1957, the Court gave its opinion with findings of fact and conclusions of law, awarding the Glens Falls Indemnity Company a lien on the property involved herein in the amount of $3,434.78. (R. 121-126; J.A. 16-19).

On January 30, 1957, after hearing the motion of Mary Golden to make amended and additional findings of fact and conclusions of law, Judge Holtzoff granted it in part and denied it in part and adjusted his findings and conclusions accordingly. (R. 128-137; J.A. 23-28). He entered judgment for the plaintiff as indicated above on January 30, 1957. (R. 192; J.A. 29).

STATEMENT OF POINTS

1. The District Court erred in holding that Mary W. Golden was not a purchaser for value of the property involved herein from the time of original purchase.

2. The District Court erred in holding that there was insufficient evidence that Mary W. Golden, at a later date, purchased the interest of her husband in the property involved herein.

3. The District Court erred in preferring the claim of Glens Falls Indemnity Company for equitable relief to the rights of Mary W. Golden, an innocent person.

4. The District Court erred in computing the amount of misappropriated funds traceable into the property involved herein.

5. The District Court erred in failing to credit reimbursements to an estate against misappropriations in order of time, beginning with the earliest misappropriation.

SUMMARY OF ARGUMENT

Misappropriated funds may be traced and recovered by the owner or one in subrogation to him only until they have come into the hands of an innocent and bona fide purchaser for value. Mary Golden is such a purchaser of the property involved herein in two respects.

Theodore Golden and Mary Golden purchased the property involved herein as tenants by the entireties. Mary Golden made substantial contributions from her own funds toward the costs of purchase. As one of the tenants by the entireties, she surrendered the right to encumber or alienate her estate, and her co-tenant had the right to the entire estate if he survived; and in return she received the right to the estate absolutely upon surviving her spouse and its protection from inconvenient administration of the decedent's estate and also its protection from debts, liens and judgments chargeable to him alone.

At a later date, but considerably before the filing of this action, Mary Golden, in good faith and for valuable consideration, purchased the interest of Theodore Golden in the property involved herein, and, through a straw party, the property was conveyed to her solely.

The Glens Falls Indemnity Company signed the bond as surety for the faithful performance of the duties of Theodore Golden as executor of the Roberts' estate as of March 12, 1948. By April 6, 1948, less than a month later, Theodore Golden had misappropriated funds from that estate. The Company's failure to make reasonable checks of the estate and exercise reasonable surveillance of Theodore Golden made it possible for him to continue misappropriating funds for a period of five years. Then, two more years passed before suit was instituted to recoup from the malfeasor's innocent wife. Equity abhors, rather than aids, such a slothful and negligent claimant.

Where one of two innocent persons must suffer a loss as the result of the wrongful act of a third person, it should fall on the one who, by reasonable diligence or care, could have prevented the act or protected himself rather than on the one who could not. The Company, by reasonable diligence or care could have discovered the

earlier misappropriations and taken effective action to prevent future misappropriations. Therefore, the Company cannot be permitted to recoup from an innocent one a loss it permitted itself to undergo.

Whenever a person holds money in a trust capacity, comingles some of it in an account with his own money, and thereafter makes withdrawals from that account for non-trust purposes, such withdrawals will be presumed to be his own money until that is exhausted. In the instant case, therefore, even if the Court should find against Mary Golden, the amount of the trust funds traceable into the property involved herein is less than the amount found by the trial court.

ARGUMENT

I.

MARY W. GOLDEN IS AN INNOCENT BONA FIDE PURCHASER FOR VALUE OF THE PROPERTY INVOLVED HEREIN AND MISAPPROPRIATED FUNDS TRACED THEREIN CANNOT BE RECOVERED FROM HER.

A. MISAPPROPRIATED PROPERTY CANNOT BE RECOVERED AFTER IT PASSES INTO THE HANDS OF AN INNOCENT PURCHASER FOR VALUE.

In Oliver, et al. v. Piatt, 3 How. 333 (1845), the Supreme Court stated, at p. 401:

> "It is a clearly established principle in that [equity] jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration, without notice."

The same principle was restated by that Court in Moore v. Crawford, 130 U.S. 122, 128 (1889). Compare also the statement in Englar v. Offutt, 70 Md. 78, 16 A. 497 (1889) at p. 86. Therefore, it is clear that if funds misappropriated by Theodore Golden from an estate of which he was executor are traced into property in the hands of a bona fide purchaser, for a valuable consideration, who is without notice, there can be no recovery from that purchaser and, of course, no lien can be placed upon the property in his hands. This principle is applicable in the instant situation even though the purchaser happened to have been Mary Golden, the wife of Theodore Golden. Her marriage could not deprive her of the right to become an innocent purchaser for value.

B. WHEN MARY GOLDEN AND THEODORE GOLDEN TOOK TITLE TO THE PROPERTY INVOLVED HEREIN AS TENANTS BY THE ENTIRETIES, SHE WAS AN INNOCENT, BONA FIDE PURCHASER FOR VALUE.

The essential elements which constitute a bona fide purchaser are a valuable consideration, the absence of notice and the presence of good faith. Berry v. Talleson, 68 Okla. 158, 172 P. 630, 632 (1918); In re Noonan's Estate, 361 Pa. 26, 63 A. 2d 80, 84, (1949). Mary Golden met these requirements.

There is no question of the innocence and good faith of Mary Golden and her absolute ignorance of any wrongdoing by Theodore Golden. The Glens Falls Indemnity Co. failed to present an iota of proof to the contrary. The trial court found specifically that Mary Golden did not know of Theodore Golden's misappropriations. (R. 125; J. A. 18). The evidence on the matter supports the finding of the trial court. (R. 78-79; J. A. 44-45).

earlier misappropriations and taken effective action to prevent future misappropriations. Therefore, the Company cannot be permitted to recoup from an innocent one a loss it permitted itself to undergo.

Whenever a person holds money in a trust capacity, comingles some of it in an account with his own money, and thereafter makes withdrawals from that account for non-trust purposes, such withdrawals will be presumed to be his own money until that is exhausted. In the instant case, therefore, even if the Court should find against Mary Golden, the amount of the trust funds traceable into the property involved herein is less than the amount found by the trial court.

ARGUMENT

I.

MARY W. GOLDEN IS AN INNOCENT BONA FIDE PURCHASER FOR VALUE OF THE PROPERTY INVOLVED HEREIN AND MISAPPROPRIATED FUNDS TRACED THEREIN CANNOT BE RECOVERED FROM HER.

A. MISAPPROPRIATED PROPERTY CANNOT BE RECOVERED AFTER IT PASSES INTO THE HANDS OF AN INNOCENT PURCHASER FOR VALUE.

In Oliver, et al. v. Piatt, 3 How. 333 (1845), the Supreme Court stated, at p. 401:

> "It is a clearly established principle in that [equity] jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration, without notice."

The same principle was restated by that Court in Moore v. Crawford, 130 U.S. 122, 128 (1889). Compare also the statement in Englar v. Offutt, 70 Md. 78, 16 A. 497 (1889) at p. 86. Therefore, it is clear that if funds misappropriated by Theodore Golden from an estate of which he was executor are traced into property in the hands of a bona fide purchaser, for a valuable consideration, who is without notice, there can be no recovery from that purchaser and, of course, no lien can be placed upon the property in his hands. This principle is applicable in the instant situation even though the purchaser happened to have been Mary Golden, the wife of Theodore Golden. Her marriage could not deprive her of the right to become an innocent purchaser for value.

B. WHEN MARY GOLDEN AND THEODORE GOLDEN TOOK TITLE TO THE PROPERTY INVOLVED HEREIN AS TENANTS BY THE ENTIRETIES, SHE WAS AN INNOCENT, BONA FIDE PURCHASER FOR VALUE.

The essential elements which constitute a bona fide purchaser are a valuable consideration, the absence of notice and the presence of good faith. Berry v. Talleson, 68 Okla. 158, 172 P. 630, 632 (1918); In re Noonan's Estate, 361 Pa. 26, 63 A. 2d 80, 84, (1949). Mary Golden met these requirements.

There is no question of the innocence and good faith of Mary Golden and her absolute ignorance of any wrongdoing by Theodore Golden. The Glens Falls Indemnity Co. failed to present an iota of proof to the contrary. The trial court found specifically that Mary Golden did not know of Theodore Golden's misappropriations. (R. 125; J.A. 18). The evidence on the matter supports the finding of the trial court. (R. 78-79; J.A. 44-45).

Also, it cannot be said she did not supply a valuable consideration for her estate which the trial court ruled is subject to a lien herein. Both sides agree that the total cost of the property involved herein was $19,093.78. As of the date suit herein was filed, March 11, 1955, there remained only $2,923.61 to be paid. (Pl. Ex. 2). The evidence showed that Mary Golden paid off the second trust of $3,000.00 completely. It showed that of the payment to settle ($5,343.78), she paid $2,659.00, a few dollars short of one-half. It showed that since August 26, 1953, she has paid all the monthly payments on the house.

Theodore Golden was the only other contributor toward the purchase of this house. He contributed $750.00 deposit with the contract of sale, and contributed $2,684.78, the remainder of the payment to settle. Between July 27, 1948 and August 26, 1953, he made payments totaling $4,500.00 on the first trust and paid the tax and heat bills. He paid nothing further for food or for the running of the house. During the same period, Mary Golden paid $2,197.35 on that trust, and paid all the other expenses that are necessary for a family's support, including food. After October, 1953, Theodore Golden did not make payments on the trust, but continued this limited scale of support by making a monthly contribution of $100.00 "for room and board." (R. 116; J.A. 55). Thus, Mary Golden supplied a substantial valuable consideration for her estate in the property involved herein. Such estate as Mary Golden received was not a gift. She contributed heavily toward its purchase, and the fact that Mary Golden's estate was one by the entireties does not disqualify her from being a bona fide purchaser.

The lower court specifically found that Mary Golden was innocent of any wrongdoing (R. 125; J.A. 18); that she had contributed toward the purchase of the property involved herein (R. 124; J.A. 18); and

that title was taken by her and Theodore Golden as tenants by the entireties (R. 122; J. A. 17). But that court concluded erroneously that she was not entitled to the protection afforded any other innocent purchaser for value. The court said, "She cannot be deemed to be an innocent purchaser for value insofar as his interest in the property is concerned, which she would have acquired by right of survivorship as a tenant by the entirety." (R. 124-125; J. A. 18). This conclusion misconceived the nature of an estate of "tenants by the entirety." It assumes that Mary Golden did not have a complete estate, and that Theodore Golden had some sort of estate independent of her which would come to her upon the event of his predeceasing her.

This Court, in Fairclaw v. Forrest, 76 U.S. App. D.C. 197, 130 F. 2d, 829 (1942) cert. denied 318 U.S. 756 discussed at great length the nature of an estate by the entireties. It concluded that each spouse has a present vested estate in the whole plus an incohate possibility of actually receiving all. And this possibility is not dependent upon anything the other spouse may or may not do, but is dependent solely upon the accident of survivorship.

At p. 200, this Court stated:

> "Next to primogeniture, unity of husband and wife was perhaps the common laws most characteristic institution. Tenancy by entirety epitomized the idea. Uniting the conceptions of marital entity and joint tenancy, it brought the latter to a climax. The spouses were properly neither joint tenants, nor tenants in common, for husband and wife being considered as one person they could not hold the estate by moieties as joint tenants, per tout et per my, but both were seized of the entirety, per tout et non per my."

The Court then pointed out that before the Married Womans Property Statutes, only the husband had been entitled to full control and benefits of the property, but now he cannot assert an exclusive right to rents

and profits, (which made the property subject to execution for his debts), or divest his wife of possession during his lifetime. "Now each is entitled to the enjoyment and benefits of the whole and neither has a separate estate therein which may be subjected to a conveyance or execution," this Court said. Ibid p. 201. Continuing on the nature of the estate, the Court said, at p. 201:

> "Notwithstanding the legal formulation that each is seized of the entire estate, the fact is that each has only a contingent possibility of ever enjoying it exclusively." (Emphasis supplied).

And, again, at p. 202:

> "Prior to the death of one it is always problematical which will survive. Each, technically seized of all, has an inchoate possibility of actually receiving all. The possibility is real and valuable, though uncertain. Mere possibilities are inalienable in the common-law system of estates. But this one is peculiar in being coupled, in legal theory, with a presently vested estate." (Emphasis supplied).

The late Justice Stevens in his concurring opinion used the following phraseology, at p. 203:

> "Once the estate is created and while it continues the husband and wife each have a concurrent interest in the whole, and therefore upon the death of one of them the whole remains to the survivor.... Upon the death of one such tenant, however, there remains to the survivor the interest in the whole which was acquired at the time of the conveyance, but also the survivor is then freed from the restriction against alienation or devisation which theretofore existed.
>
> * * * *
>
> "Since at the time Mrs. Pryor executed her will she was already as a tenant by entirety owner and seized of the real property, it cannot be said that the same was 'after-acquired property' in the usual sense of property title to which has been taken after the execution of a will." (Emphasis supplied).

Both the majority and concurring opinions cite American Wholesale Corp. v. Aronstein, 56 App. D. C. 126, 10 F. 2d 991 (1926). In that case, suit was brought by judgment creditors of the husband seeking to set aside certain conveyances of real estate made by him to his wife and to subject the estate so conveyed to the payment of their judgments. In 1920 the husband had purchased real estate which was conveyed to him and his wife by the entireties. In 1923 he became indebted to appellants and in 1924 the debts were reduced to judgment. In 1923, being then liable and insolvent, he executed a deed to his wife conveying to her his interest in the real estate.

The Aronstein case clearly decides that a claim or judgment against one spouse alone is not a lien on estates held by the entireties "or on the interest of the husband therein." Ibid, p. 127. In the Fairclaw opinion, this Court notes a contrary rule in some other jurisdictions. Supra, p. 201, n. 3.

It is clear, therefore, that in this jurisdiction, Theodore Golden never had an independent interest in the property involved herein which could be made subject to a lien for his individual obligations. Fairclaw v. Forrest, supra. And this is especially true as to any such obligation which was not even in existence at the time the title to the property was taken. American Wholesale Corp. v. Aronstein, supra.

C. AT A LATER DATE MARY GOLDEN, FOR A VALUABLE CONSIDERATION, PURCHASED THEODORE GOLDEN'S INTEREST IN THE PROPERTY AND BECAME THE INNOCENT SOLE OWNER AND, FOR THAT REASON, FUNDS MISAPPROPRIATED BY HIM CANNOT BE CHARGED AS A LIEN AGAINST HER PROPERTY.

The second respect in which Mary Golden is a bona fide purchaser for value of the property involved herein, and that the property is not subject to a lien for Theodore Golden's misappropriations, was, apparently, recognized in principle by the trial court, but the court stated:

> "The Court is not convinced that this contention has been established by a preponderance of the evidence. This contention depends entirely on oral testimony concerning an oral statement alleged to have been made by the deceased. Courts lend a reluctant ear to statements as to what a dead man may have said, especially when corroboration is lacking." (R. 125, J.A. 18).

The record contains much more evidence in support of the fact that Mary Golden purchased the interest of Theodore Golden in the property involved herein. Mary Golden testified that she made demand on Theodore Golden to purchase back the stock he had sold her for $3,000.00, and that in exchange for that stock and cancellation of the outstanding loans owed by him to her, he deeded over to her all his interest in the property involved herein. (R. 110-112; J. A. 52-53). Vera M. Daly, a witness, testified that Theodore Golden had told her that he had given Mary Golden his equity in the property involved herein for the stock he had sold to her and on a later occasion, had told her the house belonged to Mary Golden. (R. 77, 83, 86-88; J. A. 44, 46-48). In his answer Theodore Golden himself states that he repurchased the stock with his share of the property involved herein. (R. 166; J. A. 7[illegible]). Corroboration is found in the record where it is stipulated that the property involved herein was deeded from Theodore and Mary Golden to a straw party and thence to Mary Golden on February 1, 1952. (R. 183; J. A. 14); the stock certificates show transfer and cancellation (Deft. Ex. 2A, 2B and 2C); and no contrary testimony or evidence appears in the record of this case.

"Preponderance of evidence" means that the weight of the evidence offered in support of one side of a question inclines more heavily to support that side than the evidence offered to the contrary. It suggests consideration of the evidence as if weighing it on a scale. Larson v. Jo Ann Cab Corp., C. C. A. 2, 209 F. 2d 929, 931 (1954); France v. Safe Deposit & Trust Co. of Baltimore, 176 Md. 306, 311, 4 A. 2d 717, 719 (1939). In the record of the instant case, there is a preponderance

of evidence to support the fact that Mary Golden purchased the interest of Theodore Golden in the property involved herein, and, therefore, that property cannot be subjugated to a lien for an obligation of Theodore Golden alone. There is not one word of evidence to the contrary.

It is inescapably the fact that Mary Golden was, at the outset, an innocent purchaser for value of an entire estate per tout et non per my, and the Glens Falls Indemnity Company could not follow funds misappropriated by Theodore Golden into that estate to subject it to a lien in derogation of her holdings. It is also the fact that at a later date, Mary Golden became the innocent purchaser for value of an absolute fee simple estate in the property involved herein by purchasing the concurrent interest and inchoate possibility of exclusive enjoyment from Theodore Golden for valuable considerations. And under those circumstances, the Glens Falls Indemnity Company is not entitled to a lien against her property for funds misappropriated by its subrogor.

II

REASONABLE DILIGENCE WOULD HAVE PREVENTED THE DAMAGE, SO EQUITY WILL NOT PERMIT REIMBURSEMENT FROM THE INNOCENT.

Theodore Golden qualified as executor of the estate of Bertha M. Roberts on March 12, 1948, by giving a bond on which Glens Falls Indemnity Co. was surety. (R. 180-181; JA 11). By this bond, Glens Falls Indemnity Co. guaranteed the faithful performance of Theodore Golden's duties as such executor. (R. 156; JA 1). The penal amount of the bond or obligation was $50,000.00 (R. 156, 180; JA 1, 11). The record shows that on April 5, 1948, Theodore Golden started misappropriating the funds of that estate, (R. 181; JA 11), and continued to do so until August 24, 1953, a period of over five years. Glens Falls Indemnity Co. asserts that the Register of Wills began "pressing" Theodore Golden for an accounting of his activities as executor as early

as October, 1949. (R. 157; JA. 2) The record does not show any surveillance by Glens Falls Indemnity Co. or, indeed, any interest whatever in Theodore Golden's performance of his duties until after a judgment was awarded against them in October, 1954. By that time, the infidelity of Theodore Golden had been permitted to reach a figure justifying a judgment against him and Glens Falls Indemnity Co. in the amount of $27,005.29, more than half the amount of the bond. (R. 157, 181; JA 2, 11). It was not until March 11, 1955 that Glens Falls Indemnity Co. filed this action against Theodore Golden and Mary Golden. Mary Golden first obtained information of the defalcations when she was served with process. The Company did nothing to prevent Theodore Golden from executing his misappropriations or to have him removed from his position of trust, the faithful performance of which it had guaranteed, (R. 156; JA 1), and for which it received yearly premiums during the five years he was executor.

In Speidel v. Henrici, 120 U. S. 377 (1887), the Supreme Court said, at p. 387:

> "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court.' Smith v. Clay, 3 Bro. Ch. 640, note. This doctrine has been repeatedly recognized and acted on here. [citing cases]."

With like repetition, this Court has cited this identical passage. Cf. Chiswell v. Johnson, 55 App. D. C. 3, 7, 299 Fed. 681 (1924); Bliss v. Bliss, 65 App. D. C. 147, 149, 81 F. 2d, 411 (1935).

It was the Glens Falls Indemnity Co. which had a $50,000.00 stake in the proper performance of Theodore Golden's duty, not Mary Golden. It was through the Company's negligence that Theodore Golden was permitted to continue as executor so long after he first was unfaithful to his duty, and it was the Glens Falls Indemnity Co. which so lacked reasonable diligence it failed to check for years when an inquiry at the Register of Wills would have disclosed the failure of Theodore Golden to properly account in 1949, little more than a year after the Company had guaranteed his faithful performance. Equity does not require Mary Golden, an admittedly innocent person, to cure the loss the Company sustained through its carelessness, slothfulness and inattention.

Even if Glens Falls Indemnity Company was innocent of neglect and had been reasonably diligent in protecting its investment in Theodore Golden, the principal culprit is now dead and recovery should not be countenanced from the innocent widow, Mary Golden, who received nothing from his estate. A long standing principle in this jurisdiction is to the contrary of the Company's contention.

> "We may, as an additional reason, suggest a principle often called into action in recent times in the courts, namely: that where one of two innocent persons must suffer a loss, it should fall on him who, by reasonable diligence or care, could have protected himself, rather than on him who could not." National Savings Bank of the District of Columbia v. Creswell, 100 U. S. 630, 643 (1880).

Glens Falls Indemnity Company could have protected its $50,000.00. Mary Golden could not have protected her home.

III

THE LOWER COURT ERRED IN COMPUTING THE AMOUNT OF ESTATE MONEY TRACEABLE THROUGH THEODORE GOLDEN'S ACCOUNT INTO THE PROPERTY INVOLVED HEREIN.

Where a fund is composed partly of a defrauded claimant's money and partly of that of the wrongdoer, it is presumed that in the fluctuations of the fund, the wrongdoer drew out his own money first, in preference to the claimant's money. Cunningham v. Brown, 265 U.S. 1, 12 (1924); Drovers Bank v. Roller, 85 Md. 495, 499, 37 A. 30 (1897). Nor do the size of the withdrawals tend to rebut this presumption. Ferman v. South Dakota, C. C. A. 8, 29 F. 2d 776, 781 (1928). In some jurisdictions there is a conclusive presumption that the wrongdoer dissipates his own funds first. Cf. People v. Peoples Bank & Trust Co., 353 Ill. 479, 187 N.E. 522 (1935).

Viewing the facts in the instant case in the light of this principle, if Mary Golden is liable at all, she is not liable in the amount of $3,434.78 as found by the trial judge because that amount is not traceable from the estate of Bertha M. Roberts into the property involved herein.

The $3,434.78 total is obviously composed of the $750.00 Theodore Golden deposited with the contract of sale plus his share of the $5,343.78 to settle. Mary Golden's contribution to this amount totaled $2,659.00, $1,300.00 outright (R. 107; J.A.52), and $1,359.00 later. (R. 183; J.A. 13). There remained $2,684.78 which the Court credited to Theodore Golden. That amount plus $750.00 totals $3,434.78, the sum the lower court charged against Mary Golden's property.

By June 6, 1948, the date the contract to purchase the property involved herein was signed, Theodore Golden had removed $1,357.00

from the Roberts' estate. (R. 185; J. A. 15). But no claim is made that any of that money is traceable into this property. (R. 14-15; J. A. 34-35). Therefore, no claim is made that any money belonging to the estate was in Theodore Golden's account as of June 6, 1948. On June 6, 1948, Theodore Golden drew a check for $750.00 on his account as a deposit as provided for in the contract to purchase the property involved herein. On the following date when that check was debited to his account, that account contained a $2,500.00 check drawn on the estate and $289.10 of his own money. There were other debits against his account, but there remained $265.96 of his own money to be put toward the $750.00. Therefore, only $484.04 of the $750.00 amount given with the contract of sale, and charged in toto against Mary Golden by the lower court, could have been estate money.

Between June 7, 1948 and June 10, 1948, there were several withdrawals from his account, none of which are traceable into the property involved herein. Thus, estate money in his account on June 10th totaled $1,735.50. On June 10, 1948, Theodore Golden deposited $95.50 in his account which is not claimed to be from estate funds. Between June 10, 1948 and July 1, 1948, he withdrew a total of $655.14 from his account, of which all but $95.50 was money from the estate, and none of this is traceable into the property involved herein. On July 1, 1948, he deposited $563.00 in his account which is not claimed to be estate funds. As of July 1, 1948, then, Theodore Golden's account contained $1,175.86 of estate funds and $563.00 of his own money for a total of $1,738.86. Between that date and July 7, 1948, he withdrew $120.63, presumably from his own money. His balance then totaled $1,618.23, of which $442.37 was his own money.

The next misappropriation occurred on July 8, 1948, when $2,750.00 was withdrawn from the estate. It is to be recalled that settlement on the property involved herein was on July 6, 1948 and the payment to settle totaled $5,343.78. (R. 183; J.A. 13). On July 7, 1948, Theodore Golden deposited $4,050.00 in his account, of which $2,750.00 is claimed for the estate. His total balance was $5,668.23. On that same date, his account was debited by a check in the amount of $5,343.00, the check given as payment to settle on the property involved herein, and his day end balance was $324.45.

It was proved that $2,659.00 of the payment to settle was contributed by Mary Golden and was deposited in his account, and since Theodore Golden's account contained $1,742.37 of his own money on the date his account was debited for this payment, only $942.41 maximum of estate funds could be traced into the property involved herein. Adding this amount to the $484.04 previously traced into the property, the total of estate funds for which a lien could be awarded was $1,426.45.

Dates	Deposits		Cks. Drawn on Acct.		Payments for House			Balance in Acct.		
	Claimed by Estate	From Other Sources	Into Property	Other	Total	Own Money	Estate Money	Total	Own Money	Estate Money
6/7/48	2,500.00	289.10	750.00	23.14	750.00	265.96	484.04	2,015.96	---	2,015.96
6/7/48 to 6/10/48				280.46				1,735.50	---	1,735.50
6/10/48		95.50						1,831.00	95.50	1,735.50
6/10/48 to 7/1/48				655.14				1,175.86	---	1,175.86
7/1/48		563.00						1,738.86	563.00	1,175.86
7/1/48 to 7/7/48				120.63				1,618.23	442.37	1,175.86
7/7/48	2,750.00	1,300.00						5,668.23	1,742.37	3,925.86
			5,343.78		5,343.78*	1,742.37	942.41			
						TOTAL	1,426.45			

*Includes $2,659.00 credited to Mary W. Golden's contributions

IV.

REPAYMENTS SHOULD BE APPLIED TO MISAPPROPRIATIONS IN PRIORITY OF TIME

As of July 8, 1948, Theodore Golden had made withdrawals from the Roberts' estate as follows: (R. 185; J. A. 15).

Withdrawals

$1,000.00	(4/6/48)
357.00	(4/20/48)
2,500.00	(6/8/48)
$6,607.00	

Theodore Golden made repayments as follows:

$1,000.00	(bequest)
1,065.00	(8/1/49)
2,500.00	(8/5/49)
3.53	(10/20/53)
$4,568.53	

It is urged that the repayments should have been credited against the withdrawals in order of time, beginning with the earliest. The lower court refused to do this in the instant case stating:

> "This rule should not govern in a misappropriations of funds. In that instance, the injured party is entitled to recover the net amount of the misappropriation, and for that purpose to follow the misappropriated funds into whatever form they may have taken, irrespective of the dates, subject, as stated before, to the limitation that once they get into the hands of an innocent purchaser for value, they become immune." (R. 124; J. A. 18).

The Court erred in this ruling.

In United States v. Kirkpatrick, et al., 9 Wheat. 720, 22 U.S. 720 (1824), the United States sued sureties, in an action of debt, on a bond given by them for the faithful discharge of the duties of one Samuel Reed as Collector of Taxes. The Court held that the bond given was to be restricted to obligations created by Collection Acts passed antecedent to the date of the bond and also that a later commission given Reed operated as a revocation of the first one and the liability of the sureties did not extend beyond the first commission. There remained the question of how the payments made by Reed were to be applied. The lower court had ruled that the United States could not apply the payments to the extinguishment of debts due subsequent to the time when the sureties ceased to be liable. The Supreme Court agreed with the lower court on this point. Speaking through Mr. Justice Story, it said at pp. 737-738:

> "The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen and a fortiori at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring and no balances are otherwise adjusted than for the mere purpose of making rests, we are of the opinion, that payments ought to be applied to extinguish the debts according to the priority of time: so that credits are to be deemed payments pro tanto of the debts antecedently due."

The doctrine is applied because "it is presumed to be the intention of the parties in the ordinary and usual course of business." Saltonstall v. Hassett, D.C. Mass., 32 F. Supp. 583, 586 (1940).

In the instant case, Theodore Golden personally was a debtor to Golden, Executor of the Roberts' estate, just as Reed, in the

Kirkpatrick case was a debtor-trustee to the United States for taxes collected. There, the sureties demanded payments made to the United States should be credited against the earliest taxes collected. The Supreme Court agreed that was the equitable procedure. Here the surety, in a similar situation, wishes to be absolved of the general rule, and for no reason. The ruling of the lower court on this matter should be reversed, assuming, arguendo, any charge should be made against the property of Mary W. Golden.

Had the lower court applied the general rule, the charges against the property of Mary W. Golden would be limited to the amount of money traceable into that estate through the account of Theodore Golden over and above replacements made into the Roberts' estate. The estate money traceable into the property of Mary Golden was misappropriated on June 8, 1948 and July 8, 1948. As of that later date, the total amount misappropriated from the Roberts' estate was $6,607.00. The total amount replaced by Theodore Golden was $4,568.53, which fully replaced the first two misappropriations totaling $1,357.00 (none of which was traceable into Mary Golden's property) and the third misappropriation in the amount of $2,500.00 (out of which the trial court traced $750.00 into Mary Golden's property), and left a credit to him of $711.53. The next misappropriation was in the amount of $2,750.00, and this occurred at the time of the payment to settle on the property involved herein. It has been shown that only $942.41 of the money expended at that time is traceable as estate money. (See Argument III, supra). The credit of $711.53 is about one-fourth of the misappropriation and, it is submitted, the credit of $711.53 due Theodore Golden should be applied pro rata between the traced money and the untraced money. It would be as inequitable for Glens Falls Indemnity Company to apply it all to untraced funds as it would be for Mary Golden to demand that it all be applied to traced funds. If we apply a credit of 25% to the

the traced funds of $942.41, this will reduce the same to $706.81, which we submit is the maximum lien which can be established, should the Court rule against us in our contention that the Bonding Company is entitled to no relief.

CONCLUSION

Wherefore, Mary W. Golden respectfully submits that the judgment of the lower court awarding the Glens Falls Indemnity Company a lien on her property in the amount of $3,434.78 should be reversed and judgment should be entered in her favor.

Respectfully submitted,

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT

For The District Of Columbia

156 [Filed March 11, 1955]

GLENS FALLS INDEMNITY CO.
Union Trust Building
Washington, D.C.

Plaintiff

vs.

Civil Action No. 1092-55

THEODORE T. GOLDEN
and
MARY W. GOLDEN
6404 9th Street, N.W.
Washington, D.C.

Defendants

COMPLAINT

(For conveyance of Title to Real Estate)

1. Jurisdiction is founded upon the Code of Laws in and for the District of Columbia and upon the general equity powers of this Court.

2. The Defendant, Theodore T. Golden, hereinafter called the defendant husband, qualified on or about March 12, 1948, as the executor of the estate of Bertha M. Roberts, Administration No. 70431, under a bond in the penal amount of $50,000.00 furnished by the plaintiff herein. By this bond the plaintiff guaranteed the faithful performance of the defendant husband's duties as executor.

3. As part of the aforesaid administration proceedings in Administration No. 70431, it has been found by this Court that from April, 1948, through August, 1953, the defendant husband made a series of improper withdrawals from the said estate funds in a net amount of $25,079.00, and devoted these funds to his own personal use, contrary to law; and in the same proceeding defendant husband, Theodore T. Golden, admitted that the withdrawals were made. The aforementioned

withdrawals are itemized on the attached Schedule A which is prayed to be read as a part hereof.

4. Beginning on or about June 8, 1948, and at various times
157 thereafter, the defendant husband applied a total of some $20,000.00 of said funds to the purchase of realty known as Lot 4, Square 2975, in the District of Columbia, together with improvements thereon known as 6404 Ninth Street, N. W., Washington, D. C., having said realty titled in his own name as tenant by the entirety with the defendant wife, Mary W. Golden. The said Mary W. Golden gave no consideration for the interest which she thus acquired in the realty, and has at no time since the purchase of said property given any consideration for her interest.

5. During the four-year period from October 1949, through October, 1953, the office of the Register of Wills for the District of Columbia was pressing the defendant husband for an accounting of his activities as executor, this supervision on the part of the Register of Wills culminating in November, 1953, with the removal of the defendant husband as executor of the aforementioned estate. During this time, to wit, on or about February 19, 1952, the defendants, as tenants by the entireties, did, with intent to hinder and defraud creditors, and in violation of their fiduciary duties as trustees, transfer title in the aforementioned realty, through one Earl P. Ready, to the said Mary W. Golden, individually.

6. As a result of the removal of the defendant husband as executor in the administration proceeding, judgments were entered on October 28, 1954, against defendant husband as executor, and against plaintiff Glens Falls Indemnity Company as his surety, in the amount of $27,005.29. As surety, plaintiff satisfied said judgment by making payment in full to the successor administrator d.b.n.c.t.a., on or about October 28, 1954.

7. By reason of the foregoing, plaintiff has become subrogated to all rights of the administrator, d.b.n.c.t.a., against defendant

husband, to the extent of the judgment, and in recognition of said right
158 of subrogation this Court did, on October 28, 1954, award judgment to plaintiff and against defendant husband in the aforesaid amount of $27,005.29. As part of the authority represented by said judgment, and its right of subrogation, plaintiff has the right to trace the funds of the estate improperly withdrawn and expended as aforesaid, wherever they may be found, and is likewise entitled to have the benefit of any appreciation in these funds and/or property, and to have the transactions with regard to the aforementioned realty declared null and void and to have said realty sold by a Receiver appointed by this Court for that purpose, the proceeds of such sale to be turned over to the plaintiff in satisfaction of its judgment against the defendant husband, and any judgment or judgments entered herein.

WHEREFORE, the premises considered, the plaintiff, Glens Falls Indemnity Co. prays:

1. That this Court enter judgment against the defendant Mary W. Golden in the amount of $20,000.00 together with interest at 6% from June 8, 1948, and the costs of this action.
2. That this Court decree that by reason of the foregoing facts the defendants hold title to the realty known as Lot 4, Square 2975, 6404 Ninth Street, Northwest, in the District of Columbia, as trustees for plaintiff.
3. That defendants as said trustees be ordered to transfer title to said property to a Receiver to be named by this Court.
4. That said Receiver be directed to sell said property at the highest available price, and out of the proceeds of such sale, to pay plaintiff, to the extent possible, the full amount of its aforesaid judgment against defendant husband of $27,005.29, as well as in satisfaction of any judgment entered herein against Mary W. Golden.

159 5. That plaintiff have such other and further relief as to this Court may seem just and proper under the circumstances.

/s/ Edward Gallagher
EDWARD GALLAGHER

/s/ Robert W. McChesney, Jr.
ROBERT W. MCCHESNEY, JR.
400 Wyatt Building
Washington 5, D. C.

Attorneys for Plaintiff

160 [Attached to Complaint]

SCHEDULE A

Repayment	Amount	Interest at rate of 6% per annum From	To
	$ 357.00	April 20, 1948	July 29, 1949
	2,500.00	June 8, 1948	July 29, 1949
	2,750.00	July 8, 1948	July 29, 1949
	2,500.00	July 23, 1948	July 29, 1949
	1,000.00	January 28, 1949	July 29, 1949
	$ 9,107.00 -	Total Withdrawals to date	
7/29/54	$1,065.00		
	$ 8,042.00	July 29, 1949	August 8, 1949
8/8/49	$2,500.00		
	$ 5,542.00	August 8, 1949	To date when paid
	700.00	January 8, 1950	" " " "
	750.00	June 1, 1950	" " " "
	1,500.00	June 26, 1950	" " " "
	450.00	July 20, 1950	" " " "
	4,000.00	August 15, 1950	" " " "
	5,000.00	August 24, 1950	" " " "
	350.00	October 3, 1950	" " " "
	600.00	October 16, 1950	" " " "
	450.00	February 13, 1951	" " " "
	650.00	May 23, 1951	" " " "
	450.00	October 23, 1951	" " " "
	1,100.00	February 4, 1953	" " " "
	1,587.00	May 12, 1953	" " " "
	450.00	July 14, 1953	" " " "
	1,500.00	August 24, 1953	" " " "
	$25,079.00 -	Net Total of Withdrawals	

161 ANSWER IN BEHALF OF MARY W. GOLDEN

Now comes the defendant, Mary W. Golden, by her attorneys below named, and as answer to the complaint herein filed, states:

1. The allegations of Paragraph One of the Complaint are admitted.

2 & 3. Though this defendant now understands that the allegations set out in Paragraphs Two and Three are probably true, yet until she was served with process in this matter and until she discussed the matter with her co-defendant, she had no knowledge of the facts therein set forth.

4. This defendant denies the allegations of Paragraph Four. Further answering Paragraph Four, this defendant states that she first met her co-defendant, Theodore T. Golden, she believes probably in December of 1946; that she believes in January of 1947 she purchased from the defendant, Theodore T. Golden, three thousand (3, 000) shares of stock at One Dollar ($1. 00) per share in Golden Distributors, and that as said investment was a different type of investment from that she had been accustomed to, she was somewhat concerned as to whether she should make the investment; that the said Theodore T. Golden, as an inducement to her to purchase said stock, agreed with her that in the event she became dissatisfied with the stock, he would repurchase it from her at the cost price. At that time this defendant was a widow
162 and her name was Mary E. Moyer.

This defendant further states that both she and her first husband had worked long and hard during their married life; that they raised two children and accumulated a very modest estate; that she married her co-defendant on, to-wit, November 12, 1947, and that prior to that time and prior to any dealings with her said co-defendant, she had funds of her own; that some time before their marriage (they were engaged) she and her co-defendant purchased premises 611 Tuckerman Street, N. W., Washington, D. C., and each was to contribute approximately fifty per cent to the purchase of said property. Actually, this defendant contributed substantially more than fifty per cent to the purchase of said

property. Thereafter this defendant and her co-defendant purchased premises 6404 9th Street, N. W., Washington, D. C., and each was to contribute approximately fifty per cent to the purchase of said property; the above-mentioned Tuckerman Street, N. W. premises were sold shortly after the purchase of the said 9th Street property and the proceeds from the sale of the Tuckerman Street property were used in part in connection with the purchase of the 9th Street property, or in connection with reducing the encumbrances on the 9th Street property. As above-stated, this defendant contributed the larger part to the purchase of the Tuckerman Street property, and consequently a larger part to the purchase of the said 9th Street property.

Later, this defendant, becoming dissatisfied with the stock in Golden Distributors, she made demand upon her husband for the return to her of the Three Thousand Dollars ($3,000.00) she had paid for said stock; she was advised by her co-defendant that he was not in position to repay her the purchase price of said stock but he suggested that she deliver the said stock to him and that he would have the 9th Street property, which then stood in their joint names as tenants by the entirety, conveyed to a straw, and they have the straw convey said property to her; that pursuant to said arrangement, she did deliver

163 said stock to her co-defendant and her co-defendant and she conveyed said 9th Street property to Earl P. Ready, and the said Earl P. Ready thereafter and almost concurrently therewith, conveyed said property solely to this defendant.

This defendant specifically denies that she gave no consideration for said 9th Street property, but on the contrary, alleges that through her contributions to the purchase of said property and the return of said stock to her co-defendant, she had paid the full purchase price of said property. Further, this defendant states that at the time of the transfer of title to her, she was without information as to any demands which might have existed in behalf of others against her said co-defendant.

5. This defendant denies the allegations of Paragraph Five and adopts the statements made by her in Paragraph Four herein as further answer to Paragraph Five.

6 & 7. This defendant, until the service of process upon her and until she thereafter conferred with her co-defendant, had no information as to the facts set out in Paragraph Six and Seven, but is now advised that said allegations are substantially accurate.

In further answer to said Complaint, this defendant denies that the plaintiff has any right to a judgment against her in the sum of Twenty Thousand Dollars ($20, 000) or in any other sum. This defendant denies that there are any facts which would justify or require a decree that this defendant holds title to the 9th Street property as trustee for the plaintiff and denies that the plaintiff has any right to have the said property transferred to a receiver or to have said property sold in order to satisfy the alleged claim of the plaintiff.

Further answering said Complaint, this defendant states that long prior to her marriage and ever since her marriage, she has conducted a sewing or alteration shop or business; that she has worked long and strenuously at her work and that she has acquired and retained said property as a result of (a) the money which she had prior to her

164 marriage to her co-defendant; (b) the money she has earned from her alteration and sewing business; and (c) the money she has earned from taking in roomers. Prior to her marriage to her co-defendant, this defendant had never taken in roomers but because of the failure of her co-defendant to support and maintain her and/or her home, it became necessary that she earn additional money and she, therefore, did take in roomers in an effort to keep up the payments of her home.

/s/ Mary W. Golden
Mary W. Golden, defendant

HILL & CRENSHAW

BY /s/ Francis W. Hill, Jr.
Francis W. Hill, Jr.
Attorneys for defendant
Mary W. Golden

[CERTIFICATE OF SERVICE]

165 ANSWER IN BEHALF OF THEODORE T. GOLDEN

Now comes the defendant, Theodore T. Golden, by his attorneys below named, and as answer to the complaint herein filed states:

1 & 2. This defendant admits the allegations of Paragraphs One and Two.

3. This defendant admits that he did, unwisely, personally borrow from himself as Administrator, the sums, as alleged.

4. This defendant denies that beginning on or about June 8, 1948, or at times thereafter, he applied a total of Twenty Thousand Dollars ($20,000.00) of the funds he borrowed from the estate to the purchase of the real estate known as Lot Four (4), Square Two Thousand Nine Hundred Seventy-Five (2975), also described as 6404 Ninth St. N. W. This defendant also denies that his co-defendant, Mary W. Golden, gave no consideration for her interest in said property.

This defendant further states that he and his co-defendant were married on, to-wit, November 12, 1947; that prior to their marriage his co-defendant and he purchased premises 611 Tuckerman St., N.W.; that under the agreement he and his co-defendant, each, were to contribute approximately fifty (50) percent to the purchase of said property,

166 but that actually, his co-defendant contributed more than he did. Further, this defendant states that no part of his contributions to the purchase of said property came out of the funds of said estate. This defendant further states that subsequent to the purchase of the Tuckerman Street property he and his co-defendant purchased premises 6404 Ninth St., N. W., and that each was to contribute approximately fifty (50) percent to the purchase of said property; that shortly after the purchase of the Ninth Street Property he and his co-defendant sold the Tuckerman Street property and the proceeds from the sale of the Tuckerman Street property were used in part in connection with the purchase of the Ninth Street property and/or in connection with the reduction of the encumbrances on the Ninth Street property; that as his co-defendant had

contributed the larger part to the purchase of the Tuckerman Street property and as the proceeds of the sale of the Tuckerman Street property were used to aid in the purchase and reduction of the mortgage on the Ninth Street property, his co-defendant, therefore, did, in fact, make a larger payment toward the purchase of the Ninth Street property than had been agreed upon between them.

This defendant further states that in January of 1947 his co-defendant purchased from him Three Thousand (3,000) shares of stock of Golden Distributors at One Dollar ($1.00) per share; that in order to induce his co-defendant to make said purchase he did agree that in the event she became dissatified with the investment he would repurchase said stock from her at the purchase price. Sometime after the purchase of the Ninth Street property his co-defendant became dissatisfied with said stock and demanded that he repurchase said stock; that he was not in position to repurchase said stock, but he did recognize his legal liability under his aforesaid agreement, and he suggested that in lieu of purchasing said stock he would be willing to have the stock turned over to him and that he would convey his interest in and to the Ninth Street property to his co-defendant; that the co-defendant acquiesced in this

167 suggestion and the conveyance of the property was made so that though title was originally taken in his and his co-defendant's names as tenants by the entirety, yet now title is solely in the name of his co-defendant.

Further answering this complaint, this defendant denies that any part of the payment which he made on the Ninth Street property came from the said estate.

5. This defendant denies that on or about February 19, 1952, he, with intent to hinder and defraud creditors, and in violation of his fiduciary duty, transferred title through Earl P. Ready to the said Mary W. Golden, individually; but on the contrary, alleges that said transfer was made in good faith and not in violation of law.

6. This defendant admits that judgment was entered against him, as alleged.

7. This defendant does not deny that the plaintiff has a claim against him but denies that the plaintiff, by right of subrogation, or otherwise, has any claim, directly or indirectly, in or to the so-called Ninth Street property, and denies that the plaintiff has the right to have the deed to his co-defendant declared null and void; denies that the plaintiff has the right to have a receiver appointed and have the property sold by a receiver.

/s/ Theodore T. Golden
Theodore T. Golden

HILL & CRENSHAW

BY /s/ Francis W. Hill, Jr.
Francis W. Hill, Jr.
Attorneys for defendant
Theodore T. Golden.

[CERTIFICATE OF SERVICE]

STIPULATION OF FACTS

180 It is stipulated and agreed by and between the parties hereto, through their respective counsel of record, that the following facts shall be taken as true, it being understood and agreed that this Stipulation is without prejudice to the rights of either plaintiff or defendants to object to any of the facts herein stipulated to be true upon the grounds of immateriality or irrelevancy and to introduce other evidence not inconsistent with the facts herein stipulated to be true.

1. That plaintiff Glens Falls Indemnity Company is a corporation with principal offices in Glens Falls, New York, and a branch office in the District of Columbia; that defendant Theodore T. Golden is now deceased, having died on August 3, 1955; that defendant Mary W. Golden is the widow of Theodore T. Golden and is a resident of the District of Columbia; and that this Court has jurisdiction to entertain this suit.

2. That defendant Theodore T. Golden (hereinafter sometimes referred to as "the husband") on March 12, 1948, qualified as Executor under the Will of Bertha M. Roberts in this Court in Administration No. 70431, by furnishing a bond, on which plaintiff signed as surety, the bond being in the penal sum of Fifty Thousand Dollars ($50,000.00), and the condition of the bond being that defendant Theodore T. Golden would faithfully perform his duties as Executor under the Will of the said Bertha M. Roberts.

181 3. That it has been adjudged by this Court as part of the proceedings in Administration No. 70431, that between April 5, 1948, and August 24, 1953, defendant Theodore T. Golden made a series of withdrawals from the estate of the said Bertha M. Roberts, and devoted said funds to his own personal use, contrary to law, depositing the same to his own personal account at the American Security & Trust Co., Main Office; and that in the same proceeding defendant Theodore T. Golden admitted this to be true. The wrongful withdrawals and said deposits are itemized on Exhibit "A" attached to this Stipulation, and hereby made a part hereof.

The total of said withdrawals amounted to $29,644.00, on account of which the defendant Theodore T. Golden is entitled to credits by way of bequest and repayments in the sum of $4,568.53, resulting in a shortage of $25,075.47. Said Theodore T. Golden, by Order entered November 10, 1953, was removed as Executor and John W. Jackson was appointed Administrator d.b.n.c.t.a.; thereafter, judgment was entered against Glens Falls Indemnity Company and against said Theodore T. Golden in the sum of $25,709.37; the judgment against said Glens Falls Indemnity Company bore interest at six percent from December 8, 1953; said surety paid said judgment, which, with interest, amounted to $27,005.29, and it was awarded judgment against defendant Theodore T. Golden in the sum of $27,005.29 with interest at six percent.

4. A. Defendants Theodore T. Golden and Mary W. Golden were married on November 12, 1947. She first met her future husband in connection with a business transaction on December 11, 1946. As of September 8, 1947, Theodore T. Golden received some $11,716.00 from the sale or real estate not involved herein, and deposited same to his personal checking account at the American Security & Trust Co., Main Office. At the time of her marriage to Theodore T. Golden, Mary W. Golden had separate assets in the approximate amount of

182 Eleven Thousand Four Hundred Seventy-one Dollars ($11,471.00) and was earning approximately One Hundred Dollars ($100.00) per month doing alterations on ladies' clothing; shortly after her marriage, as a result of longer hours of work, she made and has been making, from her sewing, approximately One Hundred and Ten Dollars ($110.00) per month.

B. During the same period, rooms in the Ninth Street property, hereinafter referred to in more detail, were rented by said Mary W. Golden from time to time, all of which rents were received by her and amounted to approximately Six Thousand Three Hundred Seventy-five Dollars ($6,375.00). In addition, the basement of the property was used as a place to carry on her sewing business and for her sleeping quarters. Following is a complete statement of Mrs. Golden's income over the period November, 1948 through May 31, 1956, exclusive of receipts from alterations shop:

Period	Source of Income	Amount per Month	Total
Nov. 1948 thru Dec. 1951	Son-in-law, Frank Harris, for debt and care of child, Kenton	$40.00	$1,520.00
Jan. 1952 thru Sept. 1953	Son-in-law, Frank Harris, for debt and care of child, Kenton	50.00	450.00
March 1949 to June, 1950	Mrs. Maud Jordan, room and board;	75.00	1,125.00
	laundry	4.00	60.00
Aug. 1951 thru Jan. 1952	Room rent from Major Harnett	40.00	240.00

Period	Source of Income	Amount Per Month	Total
May 1952 to Oct. 1955	Room rent from Vera Staley	35.00	$1,435.00
Oct. 1955 to May 31, 1956	Room rent from Vera Staley	40.00	320.00
Oct. 1954 to Oct. 1955	Room rent from Pauline Mueller	50.00	600.00
Oct. 1955 to May 31, 1956	Room rent from Pauline Mueller	60.00	480.00
Oct. 1954 to May 31, 1956	Laundry & ironing for Miss Mueller	5.00	100.00
April 1956 to May 31, 1956	Room rent from Mr. McCoughlin	30.00	45.00
	Total		$6,375.00

(This income averaged a little over $70.00 a month.)

183 5. On or about June 6, 1948, Theodore T. Golden and Mary W. Golden contracted to purchase a house and property at 6404 Ninth Street, Northwest, Washington, District of Columbia (Lot 4, Square 2975) and took title thereto as tenants by entirety by deed dated July 6, 1948. Mrs. Golden sold another property owned by her and when settlement was made on October 8, 1948, there was due to her the total sum of $6,859.90; of this sum $3,000.00 was used to pay the second trust on the said recently acquired 9th Street property, and the balance of said sum, namely $3,859.00, was turned over to Theodore T. Golden and was deposited by him in his personal account; shortly thereafter he returned $2,500.00 thereof to Mary W. Golden and retained $1,359.00, which belonged to Mary W. Golden.

6. The Ninth Street property was purchased as follows:

Deposit at signing of contract	$ 750.00	(Theodore T. Golden)
Payment of second trust	3,000.00	(Mary W. Golden)
Payment to settle	5,343.78	(Theodore T. Golden* and Mary W. Golden)
First trust assumed	10,000.00	(Theodore T. Golden and Mary W. Golden)
	$19,093.78	

(* Each party contributed individually to this settlement fund, and it remains to be proved how much each party contributed to it, either at the time of settlement or later, and whether one party later purchased the interest of the other.)

7. By deed dated February 1, 1952, said Theodore T. Golden and Mary W. Golden conveyed said 9th Street property to one Earl P. Ready; said Earl P. Ready by deed dated the same day and recorded February 29, 1952, conveyed said property to said Mary W. Golden, in fee simple.

CONTENTION: Mary W. Golden contends (the plaintiff disagrees) that she paid full value for the interest of said Theodore T. Golden.

184 8. From July 13, 1954, to and including September 21, 1956, Mary W. Golden has, from her own funds, paid a total of $3,150.00 on said note, of which $268.45 was applied to interest and $2,881.55 was applied to principal, leaving due $1,084.35 with interest from September 21, 1956.

Dated this 30th day of November, 1956.

/s/ Francis W. Hill
Attorney for Defendant,
Mary W. Golden.

/s/ Edward Gallagher

/s/ Robert W. McChesney, Jr.
Attorneys for Plaintiff

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EXHIBIT "A"

Deposits to Theodore T. Golden Personal Account		Withdrawals from Roberts' Estate	
Date Check Deposited	Amount	Date Check Charged to Estate	Amount
4-5-48	$1,000.00	4-6-48	$ 1,000.00*
4-19-48	377.00 2/	4-20-48	357.00
6-7-48	2,500.00	6-8-48	2,500.00
7-7-48	(3,050.00 1/	7-8-48	2,750.00
	(1,000.00 1/		
7-22-48	2,503.86	7-23-48	2,500.00
1-27-49	1,020.42	1-28-49	500.00
		1-28-49	500.00
3-7-50	1,400.00 2/	3-8-50	700.00
5-31-50	2,436.49 2/	6-1-50	750.00
6-23-50	1,500.00	6-26-50	1,500.00
7-19-50	450.57	7-20-50	450.00
8-14-50	4,000.00	8-15-50	4,000.00
8-23-50	5,028.94	8-24-50	5,000.00
10-2-50	357.00	10-3-50	350.00
10-13-50	788.91 2/	10-16-50	600.00
2-12-51	495.59	2-13-51	450.00
5-22-51	699.50 2/	5-23-51	650.00
10-19-51	491.26	10-23-51	450.00
2-3-53	1,350.00 2/	2-4-53	1,100.00
5-11-53	1,587.50	5-12-53	1,587.00
7-13-53	469.00	7-14-53	450.00
8-21-53	1,502.50	8-24-53	1,500.00
		Total	$29,644.00

Theodore T. Golden is entitled to the following credits:

Bequest	$1,000.00	
Repayments:		
Aug. 1, 1949	1,065.00	
Aug. 5, 1949	2,500.00	
Oct. 20, 1953	3.53	
Total repayments		4,568.53
Balance due by Theodore T. Golden		$25,075.47

(* This unauthorized withdrawal was not charged against Mr. Golden in the accounting of the Roberts' Estate due to the fact that decedent bequeathed that amount to him.)

(1/ These two items are made up of the withdrawal from the Estate in the sum of $2,750.00 and $1,300.00 from funds placed by Mary W. Golden to Theodore T. Golden.)

(2/ These deposits include the funds withdrawn from the Estate on the approximate corresponding dates and additional funds which did not come from the Estate.)

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121 OPINION OF THE COURT

THE COURT: This is an action to reach assets of a decedent's estate claimed to have been misappropriated by the executor of that estate. The suit is brought by the surety on the executor's bond, the surety having made good the defalcation, and therefore being subrogated to the rights of the estate. The assets sought to be reached consist of a residence purchased by the executor and his wife as tenants by the

122 entirety, it being claimed that part of the purchase price of the property was paid with misappropriated funds.

The defendants originally named were the executor and his wife. The former died since the commencment of that action and therefore his widow is the sole defendant.

The proof establishes the following facts. One of the original defendants, Theodore T. Golden, was executor of the Estate of Bertha M. Roberts in this Court. He furnished a bond of $50,000 on which the plaintiff in this case was surety. Between April 5, 1948 and August 24, 1953, the defendant Theodore Golden misappropriated certain funds of the estate, the total of these misapplications amounting in the aggregate to $29,644. In August, 1949, the executor repaid the

estate a total of $3,565. Additional defalcations, however, took place subsequent to that time. The total net shortage amounted to $25,075.47.

In June, 1948, the executor and his wife, who is the second defendant named in the complaint, purchased as tenants by the entirety a house known as 6404 9th Street in the City of Washington. Both the executor and his wife contributed to the purchase price. Out of the contribution made by the husband the sum of $3,434.78 can be traced as being a part of the proceeds of the misappropriations commited by him.

123 The arm of equity is long enough and strong enough to reach assets misappropriated by a trustee as far as they can be traced, subject to the limitation that if they get into the hands of an innocent purchaser for value immunity attaches to them. These principles were formulated by Mr. Justice Story in Oliver v. Piatt, 3 Howard 333,400, where the learned Justice stated: "It is a clearly established principle that whenever the trustee has been guilty of a breach of the trust, and has transferred property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchase for a valuable consideration, without notice. If the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly trace, the cestui que trust has his election either to follow the same into the new investment or to hold the trustee personally liable for the breach of the trust."

And again Mr. Justice Story states that if part of the funds of the cestui que trust has been commingled with other funds exclusively belonging to the trustee in a new purchase or investment, "there may be ground to hold the trust funds in charge pro tanto therein."

There are two defenses adduced against the plaintiff's claim. One is

124 that the amount that the executor restored to the estate in August, 1949, should be credited as against the item of misapplication from which the payment for the real property was made. The theory on which this contention rests is that when partial restitution is made toward a series of misappropriations, the repayment should be credited as against the first defalcation.

The Court is of the opinion that this principle is not applicable in this instance. This doctrine applies to a running account between

the parties. In that event, the first item credited would be applicable to the first item debited and so forth. This rule, however, should not govern in a misappropriation of funds. In that instance, the injured party is entitled to recover the net amount of the misappropriation, and for that purpose to follow the misappropriated funds into whatever form they may have taken, irrespective of the dates, subject, as stated before, to the limitation that once they get into the hands of an innocent purchaser for value, they become immune.

The second defense is that the wife was an innocent purchaser for value. The original purchase, however, was made jointly by the executor and his wife. Each contributed to the purchase price. She cannot be deemed to be an innocent purchaser for value in so far as his interest in the property is concerned, which she would have acquired by right of survivorship as a tenant by the entirety.

125 It is asserted, however, that she purchased his interest. The Court is not convinced that this contention has been established by a preponderance of the evidence. This contention depends entirely on oral testimony concerning an oral statement alleged to have been made by the deceased. Courts lend a reluctant ear to statements as to what a dead man may have said, especially when corroboration is lacking. Lea v. Polk County Copper Co., 21 How. 493, 504.

The Court desires to call attention to the fact that the complaint in this instance is predicated on fraud and seeks to impress a trust on the property in question. The charge of fraud has not been sustained. On the contrary, it has been established as a fact that the wife did not know of her husband's defalcations and was not aware of the fact that a part of the money that he was putting into the property came from misappropriated funds. Traditionally equity may, however, adjust its relief to the proof. The Federal Rules of Civil Procedure, Rule 54 (c), have carried this principle into civil actions generally and expressly provide that a party is not bound by his prayer for relief but may receive such relief as the proof shows him to be entitled to.

Finally, it may be said that even though the wife was not aware of her husband's wrongdoing, nevertheless, she was unjustly enriched by
126 his action. In equity and good conscience she should be required to refund the amount of the unjust enrichment.

The Court concludes as a matter of law that the plaintiff is entitled to a lien on this property for the sum of $3,434.78 and that the property should be impressed with a trust in the plaintiff's favor in that amount.

A transcript of this oral decision will constitute findings of fact and conclusions of law in accordance with the Rules.

Counsel may submit a proposed judgment.

MR. HILL: If your Honor please, may I make an inquiry? There was just one part of your statement that I am not quite clear about what you said, and it is in connection with our proof or our testimony about the purchase of the house and reference to the cancellation of loans and the turning back of the stock.

Your Honor did make a statement to the effect that you were not convinced, and I didn't get your next few words.

THE COURT: By a preponderance of the evidence.

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187 [Filed January 30, 1957]

MOTION OF DEFENDANT MARY W. GOLDEN TO AMEND AND TO MAKE ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes the defendant, Mary W. Golden, by her attorneys below-named, and moves the Court to make amended and additional findings of fact and conclusions of law, as set out in a proposed Amended

and Additional Findings of Fact and Conclusions of Law, a copy of which is hereto attached and made a part hereof.

/s/ Francis W. Hill

/s/ William F. Becker

Attorneys for defendant
Mary W. Golden

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188 [Filed January 30, 1957]

AMENDMENT TO AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. By way of correction: The defendants originally named were the executor and his wife. The former died since the commencement of this suit, and thereafter an administrator was appointed for his estate and the administrator was substituted as a defendant.

2. By way of correction: The executor, in August 1949, made restitution to the estate in the sum of Thirty-five Hundred and Sixty-five Dollars ($3,565.00) and by reason of the fact that he was a beneficiary of the estate in the amount of One Thousand Dollars ($1,000.00), which sum was paid to him by way of a credit on his defalcations, he therefore became entitled to a total credit of Forty-five hundred and Sixty-five Dollars ($4,565.00) on his defalcations.

3. By way of correction: There are four defenses adduced against the plaintiff's claim, namely:

189 (a) That the defalcations continued over a period of more than five (5) years and that the plaintiff, seeking the aid of an Equity Court, is estopped from asserting its lien to the real estate in the hands of Mrs. Golden by reason of its lack of diligence in any way supervising or checking the acts of the executor and the accounts of the estate.

(b) That at the time of the purchase of the property, the husband and wife both contributed to the purchase price and they took title as tenants by the entirety; that the wife, at that time, had no knowledge or information that the funds invested by the husband in the property came from the estate; that she acted in good faith; that as a result of the relationship of tenants by the entirety, the husband and wife both were seized of the entirety, per tout et non per my; the consequence of this was a union of husband and wife in the estate so that neither could dispose of any part without the assent of the other and the whole remained to the survivor; the plaintiff, therefore, is barred from asserting a lien against the property and as Theodore T. Golden predeceased Mary W. Golden, the whole property passed to her under her vested rights and is free from attack on the part of creditors of Theodore T. Golden.

(c) That the defendant, Mary W. Golden, in February, 1952, purchased the interest of her then husband in and to the property by cancelling loans which she had made to him in the sum of Four Hundred Twenty-Five Dollars ($425. 00) and by returning to him three thousand (3, 000) shares of stock of Golden Distributors, Inc., which she had purchased from him prior to their marriage for the sum of Three Thousand Dollars ($3, 000. 00) and with respect to which, at the time of the sale to her, the defendant Theodore T. Golden had agreed to repurchase from her at any time she became dissatisfied with said

190 stock; that at the time of the cancellation of said loans and the surrender of said stock to her husband, the said Mary W. Golden was not guilty of fraud and did not know that the husband had invested any funds from the estate in the property.

(d) That upon the theory of first in, first out, and first out, first in, the restitution of Forty-five hundred and Sixty-five Dollars ($4, 565. 00) made by way of a credit for the bequest and by way of payments on August 1, 1949, and August 5, 1949, should be applied to

the earliest misappropriations; that as the misappropriations made down to the time of the purchase of the house amounted to Sixty-six Hundred and Seven Dollars ($6,607.00) and as the restitution amounted to Forty-five Hundred Sixty-eight and 53/100 Dollars ($4,568.53), the maximum lien which can be established is Two Thousand Thirty-eight and 47/100 Dollars ($2,038.47).

CONCLUSIONS OF LAW

1. The Court concludes that the defence of estoppel cannot be applied in this case.

2. The Court concludes that the defense growing out of the original purchase as tenants by the entirety is not sound even though the defendant Mary W. Golden did not have knowledge that the husband did apply money which he had misappropriated from the estate to the purchase price of said house.

3. The Court finds that the defendant Mary W. Golden has failed to sustain, by the preponderance of evidence, her allegation that she, in February, 1952, paid value for her husband's interest in the real estate.

4. The Court reaffirms its conclusion of law that the restitutions made to the estate cannot be applied to the first defalcations, but that the plaintiff is entitled to a lien for the money it has traced from the
191 estate into the property.

/s/ Alexander Holtzoff
Judge

EXERPTS FROM PROCEEDINGS
JANUARY 30, 1957

128 MR. HILL: If Your Honor please, in the matter of Glens Falls Indemnity Company versus Mary W. Golden, I have filed a motion in behalf of Mrs. Golden to make an amendment to and make additional findings of fact and conclusions of law.

I did attach a copy to the motion, but there is the original, if Your Honor please.

With respect to the first paragraph, that is, I take it, an inadvertence. I do have a copy of Your Honor's opinion, and there you stated that the defendant Theodore died, and the case went on trial solely against her.

Actually, there was an order entered by Your Honor, making the administrator of his estate a party defendant. I take it that the file is still up here, because I inquired in the Clerk's Office about the file, and I take it the file is still here, and they did give me these two papers that
129 belonged to it, and you will see at the bottom that there is an order of Your Honor's, making the administrator a party defendant.

I don't believe that is really material, but I thought we might as well have the record on it.

THE COURT: Of course, I am not granting any relief as against the administrator.

MR. HILL: I know, Your Honor, but the statement is made in your opinion that the case proceeded solely against Mary W. Golden.

THE COURT: That is right.

MR. HILL: And I thought that should be stated.

THE COURT: Well, I think that is reasonable.

MR. HILL: Now, the second point, if Your Honor please, is that in your opinion you did state that the executor repay the estate a total of $3, 565.

Now, of course, that is correct, but there was an additional credit of a thousand dollars given as a result of the bequest under the will to him, and the stipulation so sets out, and again, I don't know

whether it is very material, but if you recall, Your Honor, the stipulation which was filed did show a credit by way of bequest of a thousand dollars, and did show these repayments and did show a total reimbursement of the amount that I have in that paragraph.

130 THE COURT: Now, I have been looking at it. I have examined your findings and these various subdivisions of A, B and C. Of course, they are argumentative.

MR. HILL: Well, my only point was, Your Honor --

THE COURT: I am not going to grant A or B, because B is really a restatement of the law of tenants by the entirety, that is, in part; and in part, it contains a conclusion with which I do not agree.

MR. HILL: I don't say that this is your statement. I simply set out that these are the defenses which I made.

THE COURT: But I don't think I have to set forth the defenses in my findings.

MR. HILL: Well, the only point there, Your Honor, and I hate to belabor the question, is that Your Honor does say, if I can find the place, that there are two defenses adduced against the plaintiff's claim.

THE COURT: Well, I really meant that those are two defenses on which I wanted to comment.

MR. HILL: I see.

Well, what I was anxious about, frankly, that this case, I am afraid, is going to the Court of Appeals, and I didn't want the record to show that we only made two defenses, when we had, in fact, made these other defenses.

THE COURT: Well, I think if you made the defenses, if they appear in your pleadings or in your argument, and I think they do, you

131 are protected.

MR. HILL: Yes, sir.

THE COURT: Now, as to C, that is a finding of fact which I do not want to make, because I do not believe that was established. That, of course, would be a very useful finding. If I made that finding, I would decide the case in your favor.

MR. HILL: No, Your Honor, I am afraid you misunderstand. On the bottom of page 1, paragraph 3, there are four defenses adduced against the plaintiff's claim, namely -- I am not saying that you agree with them --

THE COURT: Oh, I see.

MR. HILL: I am simply saying that these were defenses which we adduced before Your Honor.

THE COURT: Well, I don't think it is appropriate for me to state in the findings, or if not appropriate, certainly it is not necessary, to set forth what the defenses are, because I think you made them.

MR. HILL: Yes, Your Honor.

THE COURT: And the record obviously shows that you made them.

Now, I am perfectly willing to make these additional conclusions of law.

MR. HILL: All right, Your Honor. I certainly don't want to re-argue the case, because you have ruled, or to take your time in re-
132 arguing it; but may I say this in the way of an informal motion for reargument.

I would like to invite Your Honor's attention to two cases with respect to the original taking of title by tenancy by the entireties. In other words, Your Honor did find that both parties contributed to the purchase price. Your Honor did find at that time she had no knowledge that the funds came from the estate.

I believe these two cases really show, and I didn't bring them to the attention of Your Honor previously, but they show that when the relationship is created, that each party takes an interest in the entirety along with the other party, with the complete right of taking it all upon survivorship.

THE COURT: There is no doubt about that. The court agrees with you there.

MR. HILL: Well, these two cases amplify that by holding in these two cases where that relationship is established, that the property is entirely free from the claims of the creditors of either of the parties.

Their rights become vested.

In other words, my point is that had Mrs. Golden predeceased Mr. Golden, he would have had the entire property and that would have been a part of his estate, and the bonding company could have gone against that.

133 On the other hand, as an element of the relationship of tenants by the entirety, that if she was a bona fide holder at that time, her rights were vested, not only with respect to interest in the property, but with respect to the right of survivorship, entirely free and clear of any of his creditors, including the creditor in this case.

THE COURT: The Court is in accord with you, Mr. Hill, on that point.

In fact, I have had occasion to hold that the creditors of either the husband or the wife cannot reach the interest in property held by the entireties, but this is not that situation.

This is not a case of a creditor seeking, say, of the husband, to execute a judgment against the husband's interest in the property held by tenants by the entirety. I would have no hesitancy in holding that the creditors of the husband could not reach his interest because the property is held as a whole, but this is an equitable procedure to reach funds that went into that property, and in my judgment, this presents a different problem.

MR. HILL: Of course, my only answer is that they went into there, she being a bona fide holder, with each having the right of survivorship, and each giving up the right to have it as a part of his or her estate at that time, except by survivorship, and that though the funds were traced into the property on his part, and that with those vested rights, she is a

134 bona fide holder for value.

It is the same as if he had bought it one day and the next day sold it to her.

THE COURT: Yes; I concluded that was your point, and it is a debatable point. Perhaps it is a point that the Court of Appeals should

pass on, but I am going to adhere to my holding that misappropriated funds traced into property held by the entirety can be reached, and that the person entitled to those funds is not precluded by the fact that they were placed or invested in property owned by the entirety, rather than tenancy in common or joint tenancy.

MR. HILL: Going back to my findings and my conclusions, Your Honor, I am not quite certain about that, but should I redraft them?

THE COURT: Well, it is not really necessary. I am perfectly willing to sign them as they stand, but cross out No. 3 in the various subdivisions.

* * * * * * *

THE COURT: I take it you have no objection to this disposition, Mr. Gallagher?

135 MR. GALLAGHER: I have one comment with respect to the Finding No. 2, that deals with the $1,000 bequest. I think that the finding as it is proposed reaches the conclusion that it would be proper to deduct the total sum of $4,565, if any sum were deductable under those circumstances.

Our point with respect to the $1,000 bequest is that it was a bequest and was not restitution in the sense that the other figure was, that is, the $3500.

THE COURT: I had that in mind. Actually, I didn't have that in mind originally, but actually the defendant was entitled to credit for that thousand dollars.

MR. GALLAGHER: That he was or was not?

THE COURT: That he was entitled to it.

MR. GALLAGHER: That is right. Our point was that if there was a bequest under the will, it was a separate independent transaction that could not be related to any particular defalcation or any particular item, either an early one or a later one.

THE COURT: No, but it could be credited against the sum total of these defalcations.

I held that any restitution would be credited against the sum total.

MR. GALLAGHER: Yes, Your Honor, and, as a practical matter, I don't think it makes much difference.

THE COURT: I will let it stand.

136 MR. GALLAGHER: Your Honor, I have the judgment before the Court to consider it at this time.

THE COURT: Very well.

Have you seen this?

MR. HILL: Yes, Your Honor. The only objection -- I don't like the judgment, but its form, the only objection I have is that he is including a claim for interest, going back to March 11th, 1955.

THE COURT: I don't think you are entitled to interest, because you are tracing funds in and then creating your lien on a specific piece of property for misappropriated funds. If this were a personal judgment against the trustee, you would be entitled to interest, but I don't think you are entitled to saddle this property with interest.

* * * * * * * * *

[Filed January 30, 1957]

192 JUDGMENT ON FINDINGS OF COURT FOR PLAINTIFF

The above-entitled action came on for trial before the Court without a jury, on January 17, 18 and 22, 1957, and both the Plaintiff and Defendants having appeared and been heard, and the Court having filed its findings of fact, conclusions of law, an order for judgment, and its memorandum opinion herein, now, pursuant to said Order for Judgment, it is this 30th day of January, 1957, hereby

Ordered, Adjudged and Decreed, that Plaintiff, Glens Falls Indemnity Company, have judgment in the form of a lien on real estate known as Lot 4, Square 2975, and improvements thereon known as 6404 Ninth Street, Northwest, in the District of Columbia to the extent and in the amount of Thirty-four Hundred Thirty-four Dollars Seventy-eight cents ($3434.78), ~~with interest on said sum at the rate of six per cent (6%) per annum from March 11, 1955~~.

/s/ Alexander Holtzoff
Alexander Holtzoff,
United States District Judge
for the District of Columbia

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193 [Filed February 25, 1957]

NOTICE OF APPEAL

Comes now the defendant, Mary W. Golden, and by her attorneys appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of the Honorable Alexander Holtzoff, entered herein on January 30, 1957.

/s/ Francis W. Hill

/s/ William F. Becker,
William F. Becker,
601 Tower Building,
Washington 5, D. C.
Attorneys for Defendant,
Mary W. Golden

194 [Filed March 1, 1957]

NOTICE OF APPEAL

Comes now the plaintiff, Glens Falls Indemnity Company, and by its attorneys appeals to the United States Court of Appeals for the District of Columbia Circuit from the judgment of the Honorable Alexander Holtzoff, entered herein on January 30, 1957.

/s/ Edward Gallagher

/s/ Robert W. McChesney, Jr.

Robert W. McChesney, Jr.
1216 Wyatt Building
Washington 5, D. C.

Attorneys for Plaintiff

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
Thursday, January 17, 1957

* * * * * *

MR. GALLAGHER: Your Honor, Mr. McChesney, who is associated with me in this case, has worked out a chart whereby he can explain certain facts in the stipulation, not in the way of testimony, but in the way of elucidating on what is already contained in the stipulation, and primarily to show the connection between the deposits that were made in the American Security and Trust Company and payments that were made on the real estate.

* * * * * *

MR. McCHESNEY: I have set forth in the first two columns, Your Honor, under the heading "Wrongful Deposits" certain dates and amounts.

Now, by way of explanation, all that data comes from the stipulation that the Court has before it.

THE COURT: Now, are these figures taken from the exhibits that are attached to the stipulation?

MR. McCHESNEY: Yes, Your Honor, with the further explanation that some of the figures on the exhibits you referred to are a little larger in that they include, not only what was taken from the Roberts estate, but some other money.

THE COURT: But my question really was: Whether this summary is based on the exhibit?

MR. McCHESNEY: On that exhibit.

THE COURT: The information is taken from the exhibit? In other words, this summary, of course, is not an exhibit, but it is considered by way of argument.

MR. McCHESNEY: It is simply a visual aid, Your Honor. Those

10 first two columns are taken directly from the exhibit to the stipulation, and the second column called "Minimum Balance" for want of a better term, is the amount which the bank ledger cards before the Court in evidence show to be the lowest balance reached between the time that the defendant Theodore Golden deposited estate funds in his personal account, and the time he disbursed a check or made an expenditure on that account.

Now, the reason for that, Your Honor, is that while one of several possible theories might be advanced as to how much a plaintiff may trace, one of them is that the maximum that can be recovered is the minimum balance in the account.

For example, if the trustee deposits wrongfully fiduciary funds in his personal account on June first, a thousand dollars, and then spends $250 in the month of June, and then deposits $500 on July first, your balance at that point would be $1250.

But your minimum balance during that same period would not be $1250, but would be $750, and some of the theories tend to say that that is the maximum which a trustee or cestui que trust, rather, could recover, and I set forth the minimum balance for that purpose.

So, again, that is the lowest figure that Mr. Golden's personal account showed in his favor and to his credit between the time he made

11 the particular wrongful deposit and the time he made the particular disbursement.

THE COURT: Do you mind if I ask you a question as you go along?

MR. McCHESNEY: Not at all, sir.

THE COURT: Of course, I am not an accountant, and my knowledge of accounts are that of a layman, and a layman's attitude toward an account sometimes is a bit naive, but this is what bothers me: On June 7th, a wrongful deposit of $2500. Shouldn't you know how much there was, if anything, in that account rightfully?

Suppose he had $3,000 rightfully as of June 7th, to which he added $2500 of embezzled funds, he still had his $3,000 that he started with, doesn't he?

MR. McCHESNEY: Yes, Your Honor.

THE COURT: Now, in order to trace the money into this realty, shouldn't you negative that possibility?

MR. McCHESNEY: That would depend on what rule of law we apply, Your Honor, and it is our position that that becomes immaterial, because we could show, for example, in this case that he only had about $200 in the bank.

THE COURT: Well, that is one thing, but couldn't you show that? In other words, let me take a supposititious case: Suppose the man has $5,000 in the bank and he embezzles from somebody $2500, and adds that to his bank account, so he has $7500.

12 Now, suppose he buys $3,000 worth of real property. Is there any rule of law which would require a court prima facie to find that the embezzled money was used first rather the money that rightfully belonged to the party?

It seems to me the presumption would be that if the funds were comingled like that, and less than the amount, the rightful amount is disbursed, that the disbursement came out of the money rightfully owned.

Now, maybe the law is the other way, and if it is, I want you to tell me.

MR. McCHESNEY: No, Your Honor, the law prima facie, I should say, is just that.

In other words, if this were one transaction as we have hypothecated in this example, not in my sheet, but in the example the Court proposed --

THE COURT: Therefore, that leads me to the question, shouldn't you start with what was in the bank account at the time that the first deposit was made, the first wrongful deposit, and shouldn't you all the way through show what the rightful deposits, if any, were; and if not, negative their existence.

It is a good deal like in the income tax evasion cases. They show net worth. You have to show what a man's net worth is before you can show its increase.

MR. McCHESNEY: As I say, Your Honor, the principle which says that you presume that the trustee spends his own personal funds out of that account first, in itself and standing in the abstract is true, but our position simply is that this man, over a period of three, four or five years consistently did to the contrary. And therefore the presumption has no weight.

THE COURT: He has done what?

MR. McCHESNEY: He has consistently done to the contrary.

THE COURT: Done what?

MR. McCHESNEY: He has not spent his own money first, so as to preserve the trust funds.

THE COURT: Well, do you claim he had no money of his own?

MR. McCHESNEY: In many cases.

THE COURT: Well, should you not -- in other words, this is a burden on you to show in endeavoring to trace this money into the real property, that there was no rightful money in the bank account out of which the payments were made.

Of course, I am not telling you how to proceed. You will have to proceed in your own way, but I am trying to tell you what is bothering me.

MR. McCHESNEY: I understand that, Your Honor, and the point I am trying to make is that while we do have that in the record, the information the Court refers to ----

THE COURT: It is not in this summary.

MR. McCHESNEY: No, it is not in that for the reason that we feel we can satisfy the Court over the broad picture, that it isn't in the picture.

THE COURT: Well, proceed in your own way. I have indicated one of the problems that is in my mind.

The burden is on you. I do not have to resolve them. I am just indicating what they are.

MR. McCHESNEY: It was not my intention to argue the whole case at this point with the law and so forth.

THE COURT: I understand, but I thought it might be helpful to you if, ab initio, I indicated what is in my mind.

MR. McCHESNEY: It definitely is, Your Honor, and I appreciate that.

As far as Exhibit A to the stipulation, I might point out that that begins on April 5th, 1948, that being the first time that the defendant Theodore Golden withdrew any funds from the Roberts estate and placed those funds in his personal account.

Now, we did not make any mention of that, or I did not make any mention of that in the summary before you, because we do not claim that we can show any part of that went into the real estate.

After that original defalcation, and another one for a smaller sum later in the same month, Mr. Golden did, on June 7th, 1948, as the summary shows, deposit $2500 of the Roberts estate funds in his personal account. He added that, for the Court's information, to a balance of $174.10.

I am reading now, Your Honor, from the ledger card in evidence.

THE COURT: Let me have that.

You say he added $2500 to a blance of what?

MR. McCHESNEY: About 170-some-odd dollars.

THE COURT: $115.

MR. McCHESNEY: Well, I read the wrong figure. He wasn't quite without funds, but almost, and relatively speaking he was, because he immediately turned --

THE COURT: No, I am wrong. I was reading from the wrong column.

The prior balance was $174.10, and that, of course, was his rightful money, and he added this $2500 of embezzled money.

MR. McCHESNEY: Yes, sir.

THE COURT: I follow you up to that point. I thought perhaps that you would not mind my interrupting you.

MR. McCHESNEY: Not at all, for if you do not follow me, I

might as well sit down, and I appreciate the questions.

THE COURT: It may take a few minutes longer, but it will save time in the end.

16 MR. McCHESNEY: Now, following along that same transaction No. 1, having depsited the $2500 in his own account, he did on June 8th, the next day, draw a check for $750, which check was a deposit that he paid on the signing of the contract to purchase the only real estate which is in question in this case, and it is perfectly obvious that he could not have even considered the check or entering the contract without the benefit of those embezzled funds.

THE COURT: Well now, at that point, if I may ask you: I notice in your last column you are tracing the $750 into the real property.

MR. McCHESNEY: Yes, sir.

THE COURT: Now, why should not you trace the $750 less the $174 that he had in the bank of his own money?

MR. McCHESNEY: Because, Your Honor, the only rule which says that he should be credited with the $174.10 is the so-called presumption that he spends his own money first, and I am submitting to the Court that that presumption is utterly worthless and misleading in a case where the deposit check was about three times, or four times more than he had in the bank at the time he wrote the check, and in the very act of writing the check he flaunts such a presumption.

THE COURT: Well, do you have authority to sustain that position?

MR. McCHESNEY: Yes, I do, Your Honor.

17 THE COURT: Unless you do, I would be inclined to rule against you.

MR. McCHESNEY: We intend to submit authorities.

THE COURT: I want you to have your authorities at the close of the case.

MR. McCHESNEY: Yes, Your Honor. We intend to submit authorities to the effect that that presumption is only something that you refer to in the absence of more definite factual information.

THE COURT: Very well.

MR. McCHESNEY: In any event, even if you applied the rule, it would still follow that a figure, although a reduced figure, would be placed in that traced column.

In the second transaction, we are still referring to the first defalcation. In that transaction, I point out that between the time that he deposited wrongfully this $2500 and the time that he drew the check for $5,000-some, the minimum balance in his account was $1,175.86.

Then on July 7th, 1948, he drew a check for $5,343.78, which was used at the settlement on the purchase of the Ninth Street realty, which we are tracing funds to in this case.

Now, in drawing that check, he overdrew his account. He used the $1175 and some odd cents, and he used up the entire account, as a matter of fact.

18 Then in order to make that $5,300-some-odd good in transaction No. 3, he puts another $2750 of Roberts estate funds in his own personal account, without which his check would have bounced, to use the colloquial expression.

So that those two transactions, two and three, are tied up together because of the manner in which the defendant Theodore Golden handled it.

* * * * * *

THE COURT: Well now, I notice that on the first of July there was a deposit of $563. Now, that was rightful money, apparently.

19 MR. McCHESNEY: We have no indication as to what it is.

THE COURT: Well, are you giving him credit for that, or are you tracing the whole payment to the embezzled funds?

MR. McCHESNEY: No, in this case I think the Court will see that we are giving him credit for it; because, in transaction No. 2, I have not claimed the amount of his full balance, which was some $1600, if my memory serves me correctly. He had some $1600-and-some in the bank when he wrote that $5,000 check.

THE COURT: Now, you know, I like to simplify matters. I always do.

Let us forget for the moment the fact that there was an overdraft, and that it had to be made good.

How much money did the second payment in the real estate amount to in the aggregate?

MR. McCHESNEY: The full amount that he paid at settlement?

THE COURT: No; the second transaction of July the 7th.

MR. McCHESNEY: That was the settlement, Your Honor. The full amount he paid at that time?

THE COURT: Yes.

MR. McCHESNEY: Was the amount I have shown there as disbursement.

THE COURT: No, you showed two amounts. I want to put it all together.

MR. McCHESNEY: I only show one disbursement, Your Honor; under the disbursal amount, $5,343.78.

THE COURT: But you trace into the realty an amount of not quite $4,000.

MR. McCHESNEY: That is because we have given him -- not quite $4,000? That is right, Your Honor. We have given him credit, first of all, for the $500-some deposit the Court referred to.

THE COURT: What else?

MR. McCHESNEY: We have also given him credit for the fact that he had to get the other money somewhere else, because this total amount is all the money of ours that he had, and we cannot claim any more. He must have gotten, you see, another deposit from some other money, to deposit from some other source.

THE COURT: Very well.

MR. McCHESNEY: So we could not claim the full amount of the payment.

Now, in the fourth transaction, July 22nd, 1948, he has taken another $2500 from the Roberts estate and placed it in the American

Security in his personal account; and then between the time of July 22nd, 1948, and August 10th, 1948, about three weeks, perhaps, he has spent
21 all that money down to a minimum balance of $176.34.

Now, on the theory that he therefore spent all of our money somewhere else until he got down to the minimum balance of $176.34, and then wrote this check for $75 on August 10th, 1948, which was a payment, Your Honor, to the building association on the first trust, and the evidence already placed before the Court would show that, a payment which was credited by the Washington Building Association on August 6th, 1948, $75.

So we are claiming the full $75.

THE COURT: But did he have any of his own money in the bank during those months?

MR. McCHESNEY: He put money of his own in in addition to ours at various times, Your Honor.

THE COURT: Well, then again my question would arise: Shouldn't the $75 payment be debited first against his own money?

MR. McCHESNEY: Only if you follow that presumption that we have discussed. If you follow that presumption, and he had enough in there of his own funds.

* * * * * *

23 THE COURT: Yes; in other words, there is no presumption that embezzled funds were used for one purpose instead of another.

24 MR. HILL: That is right.

THE COURT: If you are attempting to trace this money, why, you do not have to trace it by proof beyond a reasonable doubt -- it's not a criminal case -- still the burden is on you to establish your attempt to trace it by a preponderance of the evidence.

MR. McCHESNEY: This raises another legal proposition, Your Honor. Once we have proved that a substantial sum, let us say a thousand dollars, call that a substantial sum, once we have proved that amount of money has in fact been put into this real estate and

comingled there with other funds which we do not have any claim on, there is substantial law to the effect that the fiduciary, at that point, having created this comingled mass, has the burden to distinguish that which is his own, or lose the entire mass.

THE COURT: Well, suppose the fiduciary has created a comingled mass, and suppose the proof is that he spent some of it for Object A, and some of it for Object B; then suppose it is to the plaintiff's interest to contend it was spent for Object B instead of Object A, nevertheless, I think the plaintiff has to show it went into Object B rather than Object A.

MR. McCHESNEY: I agree with Your Honor, but the Court is
25 considering now the bank account as the comingled mass. What I am standing on is the proof that he created another comingled mass.

THE COURT: What was it?

MR. McCHESNEY: In the real estate. In other words, once we have proved --

THE COURT: No, you are trying to trace these embezzled funds into this real estate.

Well, we will not argue the matter now. I have just indicated to you some of the problems as they occurred to me tentatively, and you may be thinking about them and clear them up for me.

I am not asking you to answer my questions at this time.

* * * * * *

27 MR. McCHESNEY: Transaction No. 4 referred to or involved the expenditure of the $75.

THE COURT: Well, I thought you covered the $75 amounts.

MR. McCHESNEY: I covered that first one, yes, Your Honor. Then there is No. 5, which is related to the same deposit.

THE COURT: Yes.

MR. McCHESNEY: I say related to the same deposit, because subsequent to the $75 payment already mentioned, he let that balance drop down to $49.05. Therefore, according to the theory of law which

says that that was all that was left of our funds, that that was all we could take. That point is September 8th, 1948, and he wrote a check for $75 again --

THE COURT: Well, you need not labor on that too much.

MR. McCHESNEY: The only reason I wanted to point that out, Your Honor, is that it differs from the prior one in that we do not here

28 claim the full $75, and I thought the Court might be interested in the reason why we didn't.

THE COURT: I see. I get your point.

MR. MCCHESNEY: Now, the record or the evidence which has been introduced, namely --

THE COURT: Now, 5 says, same deposit. You don't mean there was an additional deposit of $2500?

MR. McCHESNEY: No, I don't. I am still tracing the very same deposit.

THE COURT: It would be clearer if you have it that way.

MR. McCHESNEY: I see. But I expect to make the point that the record of the building association payments on the first trust would show all the dates when those payments on the first trust occurred, or were credited.

Now, perhaps I should add that for the Court's benefit, and extract it from this photostatic copy, and put it right in the summary which the Court has.

Now, another point that I would like to make by way of explanation is that, and calling the Court's attention to transaction No. 5, under the disbursement column, you see the date --

THE COURT: I wish you would not argue the case at this point. That would be entirely irregular. All I thought you were going to do is to explain the exhibit. We will have a final argument at the conclusion

29 of the trial.

MR. McCHESNEY: Well, Your Honor, I was trying to explain in this sense, that I had not attempted to put on this summary --

THE COURT: Well, suppose you explain this, and do not argue it. Suppose you do it my way.

MR. McCHESNEY: All right, Your Honor; but there are payments on here, or amounts which we claim we are entitled to, which do not appear.

THE COURT: I understand, but that can be argued by you and Mr. Gallagher later on. All I allowed you to do at this time was to explain this exhibit.

MR. McCHESNEY: Then I think that is the only other point I had, because I did not want the Court to feel that this is complete.

THE COURT: Very well.

* * * * * *

53 THE COURT: Well now, what do you say about Mr. Hill's argument that the deceased paid the $750 deposit out of his own funds; that the defendant, the present defendant, paid the second trust; and also

54 contributed $1359 to the settlement fees, so that, according to Mr. Hill's argument, the maximum amount of misappropriated funds that could have gone into this property was $3,984.78.

What do you say to that argument?

MR. GALLAGHER: Well, I say this, Your Honor, that we feel at least that much has been proved, if that is the case.

THE COURT: Very well.

* * * * * *

56 THE COURT: Well, I am inclined to the view that you have shown that $3,984.78 of mishandled funds went into this property.

MR. GALLAGHER: Yes, sir.

* * * * * *

58 MR. McCHESNEY: With the Court's permission, may I add one point not brought out on the facts, and that is that the figure -- I don't have the exact figure, around $3900, is computed as of the end of one or two or three early transactions. We can show, even if we grant the

59 benefit of the presumption we discussed yesterday, that the trustee or fiduciary was spending his own money first, we can still show in later

transactions, approximately, I will say, not less than another $950 in addition to the $3900-some-odd figure the Court mentioned.

THE COURT: You mean those $75 payments?

MR. McCHESNEY: Yes, sir.

THE COURT: It seems to me that there was more than enough of the deceased's own money in the bank account to cover those $75 payments.

* * * * * *

67 In view of these considerations, the motion to dismiss is denied, but the issues will be narrowed to the question as to whether $3,984.78 of embezzled funds went into the property.

* * * * * *

Washington, D. C.

Friday, January 18, 1957

69 ANDREW J. SHANNON

was called as a witness by the defendant and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

* * * * * *

71 A. He said that this money was spent in connection with the company that he had taken over, the Standard Mining Company, which was later -- may I refer to my notes, your Honor?

THE COURT: Yes, indeed.

THE WITNESS: The Golden Distributors Company.

* * * * * *

Q. Did he state whether that company was active, the type of business it was in, and where it was, and where it was active?

A. He stated that this company was organized to drill oil and gas

72 wells in Kentucky.

Q. Did he state whether he had drilled any wells there? A. Yes, he did.

Q. Will you state whether a part or all of the money had gone there? A. He stated that the money went, all the money went into these wells.

Q. Did he make any statement as to whether or not any of the money was used in connection with his home or for living expenses? A. He advised that none of the money that he took out of the estate of Dorothy M. Roberts went for clothes, luxuries, or into the residence at 6404 9th Street Northwest.

* * * * * *

73 VERA M. DALY

was called as a witness by the defendant and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

THE COURT: What is your name?

THE WITNESS: Vera M. Daly.

BY MR. HILL:

Q. Will you be good enough to keep your voice up? A. O. K.

Q. Where do you live, Miss Daly? A. 6404 9th Street, in Mrs. Golden's home.

Q. How long have you been living there, Miss Daly? A. It will

74 be five years this coming May.

* * * * * *

77 A. He made this statement, that he told Mary when she bought hers, her shares, that he would buy them back at the price she had paid.

So she had insisted that she needed the money, and so he said, I have given her my equity in the 9th Street home in lieu of this stock that he was buying back from her.

He said that to me, explained it to me.

* * * * * *

78 Q. Will you state what he told you with respect to the money he had taken from the Roberts estate? A. Yes, sir. It was his great regret that his wife had to know about it, and it came on her suddenly, she didn't know anything about it, and he didn't even want his sons to know about, and he was so sure that this money would come in to him, and he would be able to pay it back, that there would be no need or any

"defuculty" of any kind, of their knowing it, and that seems to be a great regret of his.

79 MR. HILL: Now, if your Honor please, I think in view of the turn of the case, it may not be necessary to ask but I was going to ask, but certainly there has been no proof showing that Mrs. Golden had knowledge of this before.

I was going to ask as to her state when she was served with this, and the testimony would be that she was just shocked almost to death, but I take it there is no need to go into that.

THE COURT: No, because I have indicated that there has been no proof of fraud or of knowledge on the part of this defendant, the present defendant, as to the source from which he obtained the money that he put in the property.

* * * * * *

80 Q. Can you tell me, Miss Daly, whether during this time Mrs. Golden did take off much time from her work; whether she had long vacations or short vacations; or what were her activities? A. In the five years I have been in her home, there has only been about, I would say, four times that she has gone anywhere.

Maybe she would leave Saturday morning, and she would have to be back for her work, and she usually came back Sunday evening, and that was to see her mother and sister in Virginia; and one of those times she was called there because of the serious illness of her mother.

* * * * * *

81 Q. What kind of hours did she work? A. Well, usually when I came down in the morning, about 7 a. m. -- of course, she did all her housework and all her laundry, took care of the yard, and did all the work, and she would be, of course, working with her household duties, preparatory to going to her alteration shop to work for the day.

Q. The alteration shop was where? A. In the basement.

* * * * * *

83 CROSS-EXAMINATION

BY MR. GALLAGHER:

* * * * * *

A. Well, it stands out in my memory this way: Mrs. Golden -- it must have been in May, around Memorial Day, because Mrs. Golden had gone to National Memorial Park to decorate the graves, and he was just a little bit irritated about -- he wanted to use the car that morning, and he was still discussing in the conversation these oil things. To him it was so real that they were going to come through, and the thing more or less was an obsession with him, and that brought up the conversation of the other, and then he told that this home belonged to Mary.

Q. What was the date of the conversation, if you know? A. Well, I would gather it was around Memorial Day, in May.

84 Q. Of what year? A. 1954.

* * * * * *

Q. And did he have any other discussion on any other subjects with you at that time? A. Well, yes.

Q. What other subjects? A. Mr. Golden was a very genteel man to converse with and he had wide interests and I think we had discussed things in the paper that day; different things like that.

Q. Do you recall any other topics of discussion besides this? A. Other than just, you might say, topics of the day.

Q. But you don't have any specific recollection of the discussion except for this one subject matter, is that correct? A. Well, it was in our conversation of that day; yes.

Q. But you don't remember any other subject that was discussed? A. Yes, we discussed some of the events of the day, or something that he had read, or something he was interested in; and he also talked to me about this project in Kentucky, in the same conversation.

Q. Well, that was part of the same subject? In other words, the

85 funds had gone to Kentucky; is that the substance of it? A. Yes. I was almost ready to go to work then. It wasn't a long conversation.

Q. Well, what prompted him, Miss Daly, what prompted him to discuss this subject with you? A. Well, I guess I could go back a bit and say I was very fortunate in going there. They both seemed to like me, and I more or less fit in the home, as the saying was, and Mr. Golden was very nice to me.

After he had known me a while, he discussed things with me.

Q. Did he discuss this oil venture fully with you? A. In this way, that he was very sure of it. To him, it just seemed a thing that was going to really materialize.

Q. Did he ever tell you how he was financing it? A. Well, no; he wouldn't have occasion to discuss that with me.

Q. Well, then, if I understand your testimony correctly -- A. In that particular conversation, I mean.

He did make a statement. Mrs. Golden asked him after the summons was served on her, she asked him and said: You know not a dime has gone into this property. He said: I don't think that there is any doubt in anybody's mind where the money went; it went into Kentucky.

86 I remember that distinctly.

Q. Why do you think he felt called upon to tell you that? A. In the course of events, he was more or less confidential, I presume.

He realized he could trust me. I had their interests at heart; and naturally, I would not go out and discuss it.

Q. You don't recall any other topic of conversation at that time? A. Other than what I told you.

Q. So that there was some other conversation when he advised you about -- A. This was another conversation; yes, sir.

Q. There were two seperate conversations? A. Mrs. Golden was present in this conversation.

Q. Which one was that? A. In which he said there is no doubt where the money went.

Q. And it was some other conversation that you had with him when he talked about the repurchase of the stock? A. That was--he told me the morning, in the same first conversation, that he had bought, had

given--that he didn't have the money to give her, so he gave her his equity in his home for the stock that he was to buy back from her.

87 * * * * *

Q. So you had two conversations on the same day; it that correct? A. Not on the same day of that type. I gave the full conversation in the conversation that he told me about his buying the stock, he also related that she might put him out of the home because it was her home, and that he had -- in other words, he indicated he had no interest in it, and that he could board in a good hotel for the hundred dollars a month he was paying her for room and board.

Q. Was that on the same Memorial Day? A. Yes, that was the first conversation in the morning.

Q. He had two conversations with you? A. Yes; because I went to work.

Q. When was the second conversation? A. Shortly after the summons was served on him and Mrs. Golden.

* * * * * *

Q. How long after was the second conversation? A. Just a few days. I think it was there after the summons was served.

88 Q. So he had told you about the intent to repurchase the stock just a few days after the suit was served on Mrs. Golden? A. He told me before the summons was served that the home belonged to her.

Q. How soon before did he tell you? A. Well, this must have been around, I would say, in the year of '54. I have been there a couple of years, I think.

* * * * * *

90 MR. HILL: May I offer in evidence, your Honor, these checks?

These checks have all been seen by opposing counsel and they are checks of Theodore T. Golden.

THE COURT: Have you seen those?

MR. GALLAGHER: Yes, your Honor, we have seen the checks. But I would like to object to their receipt in evidence on the ground, and I think you will observe, your Honor, when you have had an opportunity

to examine them, on the ground that they are irrelevant.

I think the purpose for which they are being offered is to show where other funds were spent out of this same American Security & Trust Company account.

91 We feel that the offering of them for that purpose is irrelevant because the issue here is what money came out of the account and went into this real estate, and merely because money also came out of the account and went elsewhere to us seems to be irrelevant.

We are willing to admit that that happened.

THE COURT: The objection is overruled.

MR. HILL: Your Honor, as you will see from the great number of checks, there are a great number of checks and not a single one of those was drawn either to Mrs. Golden or to the Building Association where the loan was held on the property. You will also observe, if your Honor please, on the back page, that the total checks drawn was $39,903.75, a total of approximately $40,000. You will observe, if your Honor please, that we have two columns, beginning near the bottom of page 1, showing the checks that were cashed locally and those that were cashed in Kentucky or clearly appearing to be related.

THE COURT: What page is that?

MR. HILL: From the first page, your Honor. We have paid to the payee and the check cashed locally, and either actually cashed in Kentucky or checks that were payable to people in connection with that business.

The theory of submitting the checks is to show, (1) that clearly with checks amounting to some $39,000, he certainly had some outside

92 income and, further, that the great mass of his expenditures went to Kentucky. I am not arguing the point, but apparently that was his baby, those oil wells, and he had great faith in them and the money did go there.

* * * * * *

95 MR. HILL: I do invite attention to the point I am going to make, on page 16, your Honor, Theodore Golden testified that all the money he used was in an effort, that is, all the money from the Roberts estate that he used, was in an effort to find oil in Kentucky. He drilled numerous holes trying to locate oil.

Now, that I am paraphrasing. What I am about to say now is in quotes, "That is where all the expenditures went."

He stated that he thinks the checks which he then submitted, and those are the checks I have just submitted to your Honor, that they would total something like $47,000.

Now, on page 17, he stated that the checks do not include any personal expenditures. That is paraphrasing.

Now, this is what he said: "They were just expenditures made in an effort to find oil."

* * * * * *

97 MARY W. GOLDEN

the defendant, was called as a witness in her own behalf and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

* * * * * *

98 Q. Shortly after you met Mr. Golden, did you have a business transaction with him? A. Yes, I did. I bought some stock from him.

Q. What stock did you purchase? A. I purchased $3,000 worth of stock in Golden Distributors.

* * * * * *

99 BY MR. HILL:

Q. Mrs. Golden, I show you these certificates and I ask you whether or not this is the stock which you purchased, the three certificates? A. Yes, it is, Mr. Hill.

Q. And it is dated January 31, 1947? A. That is correct.

Q. I show you a paper bearing date of January 30, 1947, and ask you in whose handwriting is this paper? A. That is Mr. Golden's, and

that is the receipt he gave me when I purchased the stock.

* * * * * *

100 MR. HILL: Your Honor, may I offer in evidence the three certificates of stock of the Golden Distributors, each for 1,000 shares and bearing certificate number 254, 255 and 256. Opposing counsel has seen these certificates.

MR. GALLAGHER: I would like to examine them, your Honor.

101 THE COURT: You may do so.

DEPUTY CLERK: Shall I mark them for identification, your Honor?

THE COURT: Not yet.

MR. GALLAGHER: May it please your Honor, this is one area of the case where it was impossible for us to stipulate any of the facts concerning this transaction, and in view of that, I think it would be necessary for the authenticity of those certificates to be approved in the usual way.

THE COURT: Oh, no, that course would not commend itself to the Court at all, Mr. Gallagher.

Of course, you have the right to make your objection, and the Court will rule on it.

MR. GALLAGHER: Well, there are other objections, I think, that would be in order, if your Honor please.

THE COURT: You may raise the objections.

MR. GALLAGHER: After the testimony concerning the certificates.

THE COURT: They are being offered in evidence at this time. I am going to pass on the admissibility of the certificates now.

It is customary in this court for counsel to stipulate, or not to require formal proof of any document, unless they actually suspect the

102 document is a forgery.

MR. GALLAGHER: I will withhold further objection at this time.

THE COURT: Very well. They may be admitted.

* * * * * *

103 MR. HILL: Do you have any question as to that she paid $3,000 for the stock at that time?

MR. GALLAGHER: No, we don't question that, your Honor.

* * * * * *

105 THE COURT: May I inquire, Mr. Hill, in paragraph 5 of the stipulation, the first paragraph states, not in so many words, but at least by inference, that out of that, that in addition to the third trust, she paid $1359.

* * * * * *

107 Q. Now, Mrs. Golden, at the time of the purchase of the 9th Street property -- at the time of the settlement, what, if anything, did you pay at that time? A. I paid $1300.

Q. And that $1300 was made up of what? A. I drew $700 out of the Prudential Building Loan, and I drew $600 out of the City Bank.

* * * * * *

109 MR. HILL: And you will observe, your Honor, that there is a
110 $3,000 item covered by the stipulation there, and the $1359 was money which she received in October, 1948 and turned over to Mr. Golden.

Now, the next item there is $100, and I wish to go into that.

BY MR. HILL:

Q. Mrs. Golden, I show you a check drawn by you to Mr. Golden on July 27, 1950, for $250.

What did that check represent? A. Well, I loaned Mr. Golden that amount of money.

Q. Did he thereafter repay a part of that money? A. Well, I think he did, Mr. Hill.

Q. How much? A. I believe it was $150.

* * * * * *

BY MR. HILL:

Q. Now, Mrs. Golden, I show you a check drawn by you on your bank account, dated December 13, 1951, payable to Mr. Golden in the sum of $100.

What did this check represent? A. That was a loan to Mr. Golden.

111 Q. Was that ever paid back in cash or any other way? A. No, not to my knowing, Mr. Hill; no.

* * * * * *

Q. Now, I show you a check drawn by you, dated June 4, 1951, to Mr. Golden in the sum of $225.

* * * * * *

Q. What was this, Mrs. Golden? A. That was a loan to Mr. Golden, too.

Q. Was that repaid? A. Not to my knowing, Mr. Hill.

* * * * * *

Q. Now, did you ever receive any dividends on this stock? A. No, I did not, Mr. Hill.

112 Q. Did the time come when you made any demand on Mr. Golden to repurchase the stock in accordance with his agreement? A. Yes.

Q. What did he say or what did he do? A. Well, when I finally just boiled it down to where I was getting hard on him for it, he said he didn't have the cash, he could not buy the stock, but he would give me his part of the 9th Street house in return for it.

Q. And then did you turn the stock over to him? A. Yes, I did.

Q. Then did you cancel these loans that we have just mentioned, the $100 loan -- A. Well, yes; that was supposed to have canceled out everything.

Q. So you took title to the house? A. To the house, yes.

Q. And canceled the loans which you had made to him? A. Yes; that is right.

* * * * * *

113 MR. GALLAGHER: I believe Mr. Hill is undertaking in cooperation with the Court and with us, to shorten the proof as to when payments were made, when the monthly payments were made and by whom, and I think that much should be shown.

THE COURT: What should be shown?

MR. GALLAGHER: When Mrs. Golden took over the payments, as we admit she did at one point.

THE COURT: Very well.

Mr. Hill, make a tender of proof.

MR. HILL: Your Honor, if counsel is willing, and I believe that he has his information, I am willing to stipulate that on the monthly payments on this house--I mean, not stipulating that they were made out of estate funds, but on the monthly payments, Mr. Golden did make
114 payments, physically made the payments from the period of July 27, 1948 to August 26, 1953, and that he physically made total payments of $4500, of which $2, 540. 76 was applied to principal and $1959. 24 was applied to interest.

* * * * * *

Q. Mrs. Golden, during that time, that is, from July 27, 1948 to August 26, 1953, what payments, if any, did Mr. Golden make in connection with the operation of the house, buying of food, and buying of supplies? A. None whatsoever, Mr. Hill. I did all of that.

Q. What was the understanding between you and Mr. Golden with respect to these things? A. That Mr. Golden was to make the payments on the house and take care of the taxes and the heat.

Q. And that was to be considered as -- A. As his part or contribution.

Q. Contribution toward running the house? A. That is correct.

Q. And all the other expenses of the house were paid by whom?
115 A. Paid by me.

MR. HILL: Now, during that same period, if your Honor please, Mrs. Golden paid $2, 197. 35 from her funds.

I think counsel will agree to that without formal proof.

MR. GALLAGHER: Yes.

* * * * * *

Q. Now, after that date who paid all of the payments on the mortgage? A. I did.

* * * * * *

116 Q. Mrs. Golden, with respect to the $900 that you mentioned that was delivered to you by Mr. Golden between October 8, 1953 and March of 1954, they were in monthly payments of $100, were they? A. Now, when you say March, it wasn't March, was it?

Q. Well, what date was it? A. He started paying in October, and I think he paid through June of '54, didn't he?

Q. Through June of 1954, and was that paid in separate sums of $100 or a lump sum? A. It was paid in a lump sum.

Q. In one lump sum? A. Yes, a month; he gave me $100 a month.

Q. That is what I meant, it was paid in monthly installments? A. That is right.

Q. What did you do with each installment when you got it? A. Well, now, I can't say exactly what I done with each installment.

* * * * * *

118 Q. Do you recall what you did with each payment of $100 that was made to you during that period by Mr. Golden? A. Well, no, I don't; not exactly.

Q. In other words, you don't recall that you took each of the payments or some of the payments to the Building and Loan Association? A. I took some of them, yes.

Q. All right. Now, do you remember how many of the payments? A. No, I do not.

Q. I believe you testified that you withdrew at the time the 9th Street house was purchased, that you withdrew $600 from one source. I believe you said the Prudential.

THE COURT: Mr. Gallagher, perhaps you didn't get the significance of my statement or perhaps you did not hear it. While you have the right to pursue this line of cross-examination, and you may do so, if you wish, but the issue as it presents itself to me is not how much she put into the property but how much he put into it.

MR. GALLAGHER: Yes, your Honor.

With that in mind, I will withdraw the question because we see the

119 case in the same light.

THE COURT: Very well.

MR. GALLAGHER: May I see the stock certificates?

BY MR. GALLAGHER:

Q. Mrs. Golden, I show you certificates that have been marked in this case as defendant's exhibits Nos. 2, 2A and 2B and ask you whether there is anything on those certificates to indicate that you transferred the certificates back?

THE COURT: Oh, they speak for themselves.

THE WITNESS: Yes, I signed them over.

THE COURT: Just a moment. I exclude that. They speak for themselves.

That is a matter of argument. You can argue that.

MR. GALLAGHER: All right, sir.

BY MR. GALLAGHER:

Q. Mrs. Golden, were you in any way familiar with the operations or activities of the Golden Distributors Corporation? A. No, I wasn't. I knew nothing of it.

Q. But you did attend some of the stockholders' meetings? A. One.

Q. Do you know whether, when Mr. Golden sold you these three certificates --

THE COURT: Well, I don't see that that is relevant.

120 MR. GALLAGHER: May I explain the purpose of the question, your Honor?

THE COURT: Yes.

MR. GALLAGHER: The contention seems to be, your Honor, that when these certificates were returned to Mr. Golden, that they formed a consideration for the transfer.

THE COURT: I understand all that, but what bearing does your question you are now asking have on that?

MR. GALLAGHER: Well, if Mr. Golden was acting for the corporation both in selling and accepting the return of the certificates, it is one thing. If he was acting in his own person, it is something else.

THE COURT: Well, I think that is a little far afield. I am going to exclude that matter.

Bring this matter to a head promptly, Mr. Gallagher.

Let us confine the case to the issue, and I told you what the issue is as I see it.

MR. GALLAGHER: I believe that is all that I have, your Honor.

* * * * * *

MR. THEO. T. GOLDEN, or
Mr. Charles T. Golden, orsurv.

71

CHECKS IN DETAIL		DEPOSITS	DATE	BALANCE
	BALANCE FORWARD		MAY 24'48	283.79 S
5.09-			MAY 24'48	278.70*
5.18-			MAY 24'48	273.52*
27.89-	10.96-			
2.50-			MAY 25'48	232.17*
2.70-	39.65-		MAY 26'48	189.82*
		121.50	MAY 28'48	311.32*
55.95-			JUN 1'48	255.37*
39.65-			JUN 2'48	215.72*
10.00-			JUN 3'48	205.72*
12.95-			JUN 4'48	192.77*
1.92-			JUN 4 SC	190.85*
1.75-	5.00-			
2.00-	5.00-			
1.00-	2.00-		JUN 7'48	174.10*
1.00-	22.14-	115.00		
		2500.00	JUN 7'48	2765.96*
750.00-	3.84-			
3.45-	75.00-		JUN 8'48	1933.67*
6.30-	39.65-		JUN 9'48	1887.72*
11.22-	20.00-			
109.00-				
12.00-			JUN 10'48	1735.50*
		95.50	JUN 10'48	1831.00*
14.19-	2.30-		JUN 11'48	1814.51*
12.00-			JUN 14'48	1802.51*
117.47-	(36.65+		JUN 15'48	1648.39*
36.65)	39.65-		JUN 15'48	1645.39*
6.00-			JUN 16'48	1639.39*
85.00-			JUN 21'48	1554.39*
			JUN 22'48	1521.64*

AMERICAN SECURITY AND TRUST COMPANY
WASHINGTON, D.C. BALANCE FORM

MR. THEO. T. GOLDEN, or
Mr. Charles T. Golden, orsurv.

. 71 R

CHECKS IN DETAIL		DEPOSITS	DATE	BALANCE
	BALANCE FORWARD		JUN 23'48	1,521.64 S
3.00-			JUN 23'48	1,518.64 *
42.00-			JUN 24'48	1,476.64 *
7.68-	25.00-			
114.00-			JUN 28'48	1,329.96 *
1.68-			JUN 28 SC	1,328.28 *
9.21-	39.65-			
39.65-			JUN 29'48	1,239.77 *
15.00-	11.00-			
3.11-	1.00-			
2.80-			JUN 30'48	1,206.86 *
6.00-	25.00-		JUL 1'48	1,175.86 *
		563.00	JUL 1'48	1,738.86 *
51.66-	13.90-			
1.50-			JUL 2'48	1,671.80 *
39.65-			JUL 6'48	1,632.15 *
13.92-	(5,343.78)			
(5,343.78)			JUL 7'48	1,618.23 *
5,343.78-			JUL 7'48	3,723.55 *
		3,050.00		
		1,000.00	JUL 7'48	324.45 *
12.00-			JUL 8'48	312.45 *
7.30-			JUL 9'48	305.15 *
.59-	160.00-		JUL 13'48	144.56 *
117.47-			JUL 19'48	27.09 *
10.00-				
.73-			JUL 20'48	17.09 *
			JUL 22'48	16.36 *
		2,503.86		
		82.33	JUL 22'48	2,602.55 *
37.50-	4.46-		JUL 23'48	2,560.59 *
42.00-	1.00-			
2,245.15-	5.46-			
12.00-			JUL 29'48	251.98 *
			JUL 29'48	239.98 *

AMERICAN SECURITY AND TRUST COMPANY
WASHINGTON, D. C.

FORM 1.64

REPLY BRIEF FOR MARY W. GOLDEN

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED SEP 10 1957
Joseph W. Stewart
CLERK

No. 13,793

MARY W. GOLDEN,

Appellant

v.

GLENS FALLS INDEMNITY COMPANY,

Appellee

No. 13,801

GLENS FALLS INDEMNITY COMPANY,

Appellant

v.

MARY W. GOLDEN,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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EX 3-0625

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 13,793

MARY W. GOLDEN,

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GLENS FALLS INDEMNITY COMPANY,

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No. 13,801

GLENS FALLS INDEMNITY COMPANY,

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Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR MARY W. GOLDEN

THE COMPANY IS NOT ENTITLED TO INTEREST, EVEN IF ENTITLED TO SOME RECOVERY.

The Glens Falls Indemnity Company sought interest from Mary W. Golden from the date of the filing of its complaint. The trial court,

in the exercise of its discretion, denied the claim for interest. The law allows interest on the grounds of an express or implied contract for its payment or as damages. In Redfield v. Ystalyfera Iron Company, 110 U.S. 174 (1884), the Supreme Court said, at page 176:

> "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages, it is often a matter of discretion . . . But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld."

To the same effect see United States v. Sherman, 98 U.S. 565, 567 (1878), United Light & Power Co. v. Grand Rapids Trust Co., C.C.A. 6, 85 F. 2d 331, 338 (1936), In re Howard, D.C. N.D. N.Y., 297 Fed. 402 (1913).

In the instant case there is no contractual relationship between Mary W. Golden and the Roberts' estate. The Company has consistently failed to distinguish between Mary W. Golden, the innocent, and Theodore T. Golden, the deceased errant trustee. Interest chargeable to Mary W. Golden, if at all, would be on the theory of damages. Since she was found to be blameless in the matter of the misappropriated trust funds (R. 125, J.A. 18), the lower court properly exercised its discretion in refusing to permit Glens Falls Indemnity Company to recoup from an innocent third party, interest on the loss it could reasonably have prevented.

In the cases cited by the Company to support its demand for interest, it was the party who had breached an agreement against whom the interest was assessed, not an innocent third party.[1]

---

1 Spalding v. Mason, 161 U.S. 375 (1896); Miller v. Robertson, 266 U.S. 243 (1924); and Crescent Mining Co. v. Wasatch Mining Co., 151 U.S. 317 (1894).

Additionally, it can hardly be contested that Glens Falls Indemnity Company has been guilty of laches herein. Cf. Golden Brief pp. 15-17.

THERE IS NO SHOWING THAT MORE TRUST MONEY THAN ALLOWED BY THE COURT IS IN MARY GOLDEN'S PROPERTY.

Glens Falls Indemnity Company offers a unique argument to support its plea for a lien in the amount of $10,593.78 against Mary W. Golden's property. They assert (a) that Theodore T. Golden embezzled almost $30,000.00, and almost all of that was taken between June, 1948 and August, 1953; (b) that during these same dates, $10,593.78 was paid by Theodore T. Golden into the property now owned by Mary W. Golden; and, therefore, (c) the Company is entitled to a lien on Mary W. Golden's property in the amount of $10,593.78. This argument lacks basis in fact and in law.

Between April 6, 1948 and August 24, 1953, nearly $30,000.00 was withdrawn from the Roberts' estate, the actual figure being $29,644.00. (R. 185, J. A. 15). However, during the same period certain repayments were made, so that the loss by embezzlement totaled $25,075.47. (R. 185, J. A. 25).

In order to arrive at the amount $10,593.75, it is obvious that the Company added together the $750.00 paid by Theodore Golden as a deposit with the contract to purchase the house (R. 183, J. A. 13), the $5,343.78 payment to settle (R. 183, J. A. 13), and the $4,500.00 principal and interest payments physicially made by Theodore Golden between July 27, 1948 and August 26, 1943. (R. 113-114, J. A. 53-54). But the Company does not attempt to cite the record to show that this money all is "distinctly traced" from the Roberts' estate through Theodore Golden.

The facts show that of the $750.00 paid as a deposit, only $484.04 could be traceable to the Roberts' estate. (J. A. 58, Golden Brief pp. 18-21, esp. p. 21). Of the $5,343.70 payment to settle, only $942.41 could be traceable to the Roberts' estate. (Only $2,684.78 of that payment is creditable to Theodore Golden at all; the remainder is creditable to Mary W. Golden). (R. 107, J. A. 52; R. 183, J. A. 13; R. 109-110, J. A. 52). Finally, although Theodore Golden physically paid $4,500.00 on the principal and interest payments, there was no proof offered that any of that money was traceable to the Roberts' estate. The record does show, however, that during that same time, Theodore Golden made no other contributions in connection with supporting his family. (R. 114, J. A. 54).

Glens Falls Indemnity Company finds less support in the law for its contention. The law is clear that where a trustee has misappropriated funds, the cestui que trust may trace them into the hands of a third person, and unless that person is an innocent purchaser for value, may follow them into "any other property into which it can be distinctly traced." Oliver v. Piatt, 3 How. 333 (1845). (Emphasis supplied). This Court in Boss v. Hardee, 70 App. D.C. 50, 103 F.2d 751 (1939), also cited by the Company, expressed the principle at p. 55 thusly, ". . . and equity will follow the fund through any number of transmutations and preserve it for the owner as long as it can be identified, no matter in whose name the legal title stands." (Emphasis supplied). This Court there cites the case of Central National Bank v. Connecticut Mutual Life Insurance Co., 104 U.S. 54 (1881), as its authority.

It is thus uncontestable that, whatever may be the law relating to the burden of a malfeasant trustee to separate his funds distinctly traced into an indistinguishable muddle, the law is quite clear that as to innocent third persons, the burden of "distinctly tracing" and "identifying" trust property remains on the claimant.

Even when trust funds are indistinguishably commingled with the trustees own funds, the claim of the cestui que trust cannot exceed the amount traced therein, and the burden of responsibility for distinguishing arises only after that amount is proved to be commingled. Then, when the commingled mass is less than the amount of trust money traced therein, the burden of going forward with proof that the mass is not trust funds is placed upon the commingling trustee.

The fallacious insistence on confusing the identity of appellant, Mary W. Golden, with the trustee, Theodore T. Golden, is the basis of the entire argument of the Glens Falls Indemnity Company. When it attempts to circumvent its inability to distinctly trace more than a sampling of trust property into the property owned by Mary W. Golden, it urges upon the court the position that she must prove what part is not trust property. None of the cases cited by the Company would put such a burden on Mary W. Golden. Firstly, they all deal with factual situations in which a trustee or fiduciary has, by some action or failure of action, indistinguishably commingled trust property with other property. In the instant case, Mary W. Golden was not the trustee and has been adjudged innocent of association with trust property. Secondly, there is here no such indistinguishable commingling of property. Trust funds may be traced from the Roberts' estate to the trustee's bank account (where the actual commingling existed) and a maximum of $1,426.45 is traceable into the property.

Respectfully submitted,

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Washington 5, D. C.

Attorneys for Mary W. Golden

BRIEF FOR APPELLEE-APPELLANT GLENS FALLS INDEMNITY COMPANY

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13793 and ~~13081~~ 13801

MARY W. GOLDEN, *Appellant,*

v.

GLENS FALLS INDEMNITY COMPANY, *Appellee.*

GLENS FALLS INDEMNITY COMPANY, *Appellant,*

v.

MARY W. GOLDEN, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 14 1957

Joseph W. Stewart
CLERK

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Dated at
Washington, D. C.
June 14, 1957.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

1. This case involves embezzled trust funds used by a trustee to purchase real estate as a tenant by the entirety. The question is whether a dishonest trustee may forever bar a court of equity from tracing trust funds by the simple device of putting the funds in a tenancy by the entirety, rather than in some other kind of tenancy or some other place.

2. In this case the funds that were clearly traceable into the real estate were some of the earliest funds that were misappropriated. The question is whether some subsequent repayments to the trust must be regarded as replacing those first defalcations, or whether repayments should be charged against the misappropriated fund as a whole; or, stated from another point of view, whether a dishonest trustee may forever bar a court of equity from tracing trust funds by the simple device of embezzling more funds than required for his improper purposes and using the excess to refund the amounts actually used for such improper purposes.

3. There is a principle that where a trustee commingles trust funds with his personal funds, the integrity of the trust fund must be maintained at every turn, and wherever possible; and that where a choice must be made between protecting his personal funds and the trust funds, the trust funds must be preferred. The question is whether this principle is applicable to this case. If so, plaintiff would be entitled to substantially more than was awarded by the lower Court.

4. The last question is whether the plaintiff is entitled to interest on the traceable trust funds from the date suit was instituted.

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MARY W. GOLDEN, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE-APPELLANT GLENS FALLS INDEMNITY COMPANY

COUNTER-STATEMENT OF THE CASE

Theodore T. Golden qualified as Executor under the Will of one Bertha M. Roberts on March 12, 1948, giving a bond for the faithful performance of his duties as executor. (R. 180; J.A. 11). The Glens Falls Indemnity Company signed this bond as surety. (R. 180; J.A. 11). It was

adjudged by the United States District Court in the matter of the Roberts' estate, Administration No. 70431, that between April 5, 1948 and August 24, 1953, Theodore T. Golden made withdrawals from that estate and devoted these funds to his own personal use, depositing them to his personal account at the American Security and Trust Co. The total of these withdrawals was $29,644.00 (R. 181; J.A. 11).

Theodore T. Golden was removed as Executor on November 10, 1953. (R. 181; J.A. 11). He was entitled to credits against the shortage in the amount of $4,568.53 as follows: (R. 185; J.A. 15).

Bequest	$1,000.00
Repayments	
Aug. 1, 1949	1,065.00
Aug. 5, 1949	2,500.00
Oct. 20, 1953	3.53
	$4,568.53

These credits reduced the shortage to $25,075.47. (R. 181; J.A. 11). A judgment was entered against Theodore T. Golden and the Glens Falls Indemnity Co. for the sum of $25,709.37 with interest at six percent from December 8, 1953. The surety paid this judgment, which with the interest, amounted to $27,005.29, and was awarded judgment against Theodore T. Golden in that amount, plus interest at six percent. (R. 181; J.A. 11).

Theodore T. Golden married Mary W. Golden on November 12, 1947. (R. 181; J.A. 12).

On or about June 6, 1948, Theodore T. Golden and Mary W. Golden entered into a contract to purchase certain improved realty in the District of Columbia which is that realty upon which Appellees sought to impose a lien or trust in the trial of this cause, and which is the only realty mentioned herein. On the same day Theodore T.

Golden gave his personal check for $750.00 as the deposit on this contract, which was later credited as part of the purchase price. (R. 183; J.A. 13). On June 7, 1948, Theodore T. Golden as executor withdrew $2,500.00 from the Roberts Estate funds and placed them in his own personal account, commingling said estate funds with his own. On June 7, 1948, Theodore T. Golden had funds of his own on deposit amounting to $174.10. On the same day charges amounting to $23.14, and a credit of $115.00 were entered on his personal account and produced a net balance of Theodore T. Golden's own funds in the amount of $265.96 to which, also later the same day, the Roberts Estate funds ($2,500.00) were added and against which the $750.00 deposit on the realty was charged. (R. 183; 185; J.A. 13, 15, 58; Pl. Ex. 1).

Between June 7, 1948 and July 6, 1948, Theodore T. Golden made withdrawals and deposited his own funds leaving a net of $1,618.23 on deposit on July 7, 1948, and the minimum balance during said period was $1,175.86 on July 1, 1948. (J.A. 58-59; Pl. Ex. 1.)

On July 6, 1948, settlement was had on the purchase of the realty by Theodore T. Golden and Mary W. Golden, Theodore T. Golden drawing his personal check for said purpose in the amount of $5,343.78. On July 7, 1948, Theodore T. Golden, as executor, withdrew another $2,750.00 from the funds of the Roberts Estate and deposited same, along with $1,300.00 given to Theodore T. Golden by Mary W. Golden, (or a total deposit of $4,050.00) in his personal account. Theodore T. Golden's settlement check exhausted the $1,618.23 referred to in the immediately preceding paragraph and overdrew his account by $3,725.55. The deposit later that day (July 7, 1948) of $4,050.00 made the settlement check good and also left a balance of $324.45 to the credit of Theodore T. Golden. (J.A. 58, 59; Pl. Ex. 1).

Theodore T. Golden made later payments on the realty (specifically charged to his personal account on March 13,

1950; August 16, 1950; September 20, 1950; October 25, 1950; October 31, 1951; February 25, 1953; March 26, 1953; April 22, 1953; May 20, 1953 and August 28, 1953) totalling $668.66 which payments unquestionably were made with funds belonging to the Roberts Estate. (R. 185, 114; J.A. 15, 54; Pl. Exs. 1 and 2). In addition it is not disputed that Theodore T. Golden embezzled over Twenty Thousand Dollars ($20,000.00) between July 22, 1948 and August 21, 1953, and deposited these Roberts Estate funds in his own account at the American Security and Trust Company (R. 185; J.A. 15); that during the same period Theodore T. Golden paid $4,500.00 out of the same personal account into the realty in question; that he ceased paying any money into said realty August 26, 1953, and ceased embezzling from the Roberts Estate on August 21, 1953. (R. 113, 114, 185; J.A. 15, 54). Nevertheless, the trial court ruled adversely to the Glens Falls Indemnity Company as to all these later payments. (R. 59; J.A. 43).

During this entire period (1948 through 1953) Mary W. Golden had the use of the realty not only as her residence, but also to rent out rooms and to conduct a business as a seamstress. (R. 81, 182; J.A. 45, 12).

The trial court ruled that the issue before it was not how much money Mary W. Golden put into the realty but how much Theodore T. Golden put into it. (R. 181; J.A. 55).

The trial court found that Mary W. Golden had failed to sustain, by the preponderance of evidence, the allegation that she, in February, 1952, paid value for Theodore T. Golden's interest in the real estate. (R. 190; J.A. 22).

On March 11, 1955, the Glens Falls Indemnity Co. sued Theodore T. Golden and Mary W. Golden, praying (1) for a judgment in the amount of $20,000 with interest, (2) a decree that the 9th Street property was held in trust for it, (3) an order directing transfer of the property to a receiver for sale, (4) the proceeds of the sale to be applied toward its judgment against Theodore T. Golden

and to any judgment against Mary W. Golden, and for such other relief as the Court deemed proper. (R. 156-159; J.A. 1-4).

Theodore T. Golden died on August 3, 1955. (R. 168). The administrator of his estate was substituted as a defendant. (R. 186).

Trial was had without a jury before the Honorable Judge Alexander Holtzoff on January 17 and 18, 1957. (R. 1-127). On January 18, 1957, the Court denied the motion of defendant, Mary W. Golden, for judgment at the close of the plaintiff's case. (R. 66). On January 22, 1957, the Court gave its opinion with findings of fact and conclusions of law, awarding the Glens Falls Indemnity Company a lien on the property involved herein in the amount of $3,434.78. (R. 121-126; J.A. 16-19). On January 30, 1957, after hearing the motion of Mary W. Golden to make amended and additional findings of fact and conclusions of law, Judge Holtzoff granted it in part and denied it in part and adjusted his findings and conclusions accordingly. (R. 128-137; J.A. 23-28). He entered judgment for the plaintiff as indicated above on January 30, 1957. (R. 192; J.A. 29).

The trial court ruled against the Glens Falls Indemnity Co. on the question of interest which was claimed on the amount of the judgment from March 11, 1955, when the Complaint was filed. (R. 136; J.A. 28).

SUMMARY OF ARGUMENT

I

This proceeding involves trust funds that were commingled by a trustee with his personal funds and later misappropriated. The effort of the plaintiff was to trace as much of those funds as possible into real estate purchased by the trustee under a tenancy by the entirety with his wife.

The lower Court allowed a limited tracing of the misappropriated funds, but only those funds which could be clearly identified or earmarked as having come out of the trust estate account in one bank, into the commingled account in another bank, and thence almost simultaneously into the original purchase of the real estate.

II

Plaintiff's position is that the Court was correct in allowing this limited tracing of funds, and thus rejecting the idea that a tenancy by the entirety bars the tracing of trust funds. But we feel the lower Court should have gone farther and held that plaintiff should have credit for all funds withdrawn from the wrongfully commingled account and placed in the real estate. This on the theory that where trust funds are wrongfully commingled with personal funds, and the commingled account is later exhausted, such funds as can be traced out of the commingled account into real estate should be deemed to be trust funds.

III

The defendant in the lower Court attempted to show that no tracing of funds should be allowed because on a date nearly four years subsequent to the original purchase the trustee's wife undertook to acquire his share of the tenancy by the return of some worthless stock she had purchased from him several years before. The argument was that this made her a bona fide purchaser for value of the trustee's share of the tenancy. The only testimony in support of this alleged transaction was the oral testimony of the wife (defendant) in the lower Court. The Court found that this oral testimony was not sufficient to demonstrate by a preponderance of the evidence that defendant was a bona fide purchaser for value of the trustee's interest in the tenancy. There would be no ground for disturbing this finding on appeal.

IV

Having held that plaintiff was entitled to trace a limited amount of the trust funds, the lower Court should have allowed interest on that amount from the time of demand, namely, from the date suit was instituted. This would be in keeping with the rule that a trust should be restored to the fullest extent possible.

ARGUMENT

To hold that a trustee could permanently bar a Court from tracing trust funds by the mere device of placing the funds in a tenancy by the entirety would be contrary to public policy

The main argument advanced by appellant is that a tenancy by the entirety is unassailable, even for the purpose of tracing trust funds. This argument was rejected by the lower Court on the basis of early United States Supreme Court decisions, and properly so. In the case of *Oliver* v. *Piatt*, 3 How. 333, 400, decision by Mr. Justice Story, the facts were similar to those presented here in that they involved tracing of trust funds into the purchase o real estate. In that case, the Court laid down the rule that:

> "It is a clearly established principle that whenever the trustee has been guilty of a breach of the trust, and has transferred property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration, without notice. If the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the cestui que trust has his election either to follow the same into the new investment or to hold the trustee personally liable for the breach of the trust."

Another decision of the United States Supreme Court to the same effect is *Central National Bank* v. *Connecticut Life Insurance Co.*, 104 U.S. 54, 26 L. Ed. 693 (1881), in which the Court discusses the doctrine of tracing trust

assets from its origins in the English law and has set forth most of the fundamental rules on this subject which have been applied by the courts since that time. One of the English cases discussed at length and cited with approval by the Supreme Court is *Pennell* v. *Deffell,* 4 DeG. M. & G., 372, 388, where the Court said:

> "It is . . . an undoubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

Having quoted the above case with approval, the Supreme Court then states:

> "This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in this court.

A case squarely in point on the facts is the case of *Long* v. *Earle,* 277 Mich. 505, 269 N.W. 577, in which the same defense was interposed, namely, that trust funds could not be traced into a tenancy by the entirety. The Court there adopted the following language:

> "'Where a husband used trust property and invested it in real estate taking title to himself and wife as tenants by the entireties, and he died, and she, as survivor, took title thereto and sold the property on an executory contract presumaly for part cash and part on time payments, she then held, either in cash or in an interest in the contract, property equitably belonging to the plaintiff, for which she had paid no consideration and to which she had no right, and upon

> which she had no equitable claim. *Watson* v. *Wagner*, 202 Mich. 397, 168 N.W. 428, 430.' "

The opinion then points up a basic lack of logic in the contention that the tenancy by the entireties is beyond reach. For the effect of such a holding would be that the trustee, by retaining an interest in entirety would put out of reach property which undoubtedly could be recovered even if he had placed *exclusive* ownership in his wife (without adequate consideration).

In another case very much like that before this Court, *Wilkins* v. *Wilkins*, 144 Fla. 590, 198 So. 335, it was stated at page 337:

> "It is elementary that where trust funds are traceable into any particular property in the hands of the trustee, a lien will be impressed upon that property to the extent of the trust fund traced thereto.
>
> "The contention is made that because the deed to the property into which the trust fund was traced conveyed the property as an estate by the entireties to J. S. Wilkins and wife, the lien could not be impressed upon that property. The fallacy of this is that the trust was impressed in the very transaction in which the conveyance was acquired and, therefore, J. S. Wilkins and wife took the property as an estate by the entireties impressed with a lien to the extent of the trust fund which went into the payment for that property."

There is no probative evidence in this case indicating that appellant was a bona fide purchaser for value

The argument is made that subsequent to the creation by the trustee and his wife of the tenancy by the entirety, she became a bona fide purchaser for value of his share of the tenancy. The lower Court found that this proposition was not sustained by a preponderance of the evidence.

In an effort to make herself out a bona fide purchaser for value, defendant undertook to testify that by oral agree-

ment, between herself and the trustee (her husband), she returned certain worthless stock to him in return for his interest in the tenancy. The stock was in an organization known as Golden Distributors, Inc., organized by the trustee to deal in oil wells, and was not shown to have any value. Aside from this, there was nothing on the face of the certificates to indicate that the stock had ever been transferred to the trustee in return for his interest in the tenancy. The lower Court felt that there was nothing of substance to corroborate the oral testimony of appellant on this subject, and thus correctly found against defendant on this point.

Defendant's oral testimony on this point was that when she bought the stock in Golden Distributors, Inc., from the trustee, who later became her husband, it was agreed that he would take the stock back if it proved to be of no value; in other words, that he had a pre-existing obligation to take the stock off her hands. By returning the stock under these conditions defendant would not become a bona fide purchaser for value, and here we emphasize the word value. It has been held that where a trustee transfers trust property in consideration of the extinguishment of a pre-existing debt or other obligation, the transfer is not for value. *Restatement of Law of Trusts* (American Law Institute), page 931, section 304; Pomeroy, Fifth Edition, Volume 3, Section 748. *Knapp* v. *First National Bank,* 154 F. 2d 395, 399 (C.C.A. 10), *Johnson* v. *Robinson,* 203 F. 2d 135, 136 (C.C.A. 5). In this connection, it should also be borne in mind that one who claims, especially in real estate transactions, the characteristics of a bona fide purchaser for value has the burden of proof of sustaining this affirmative defense. *Wright-Blodgett Co.* v. *United States,* 236 U.S. 397, 403, 59 L. Ed. 637.

Even if there were more probative evidence to support defendant's position on this point, it would not be adequate as a matter of law.

A cestui que trust should not be prohibited from tracing trust funds merely because the trustee may have restored some of the money and thereby reduced the net amount of the misappropriation

In this case the total defalcation was $29,644.00 of which the trustee restored $4,568.53. The defaulting trustee was an executor under a will, and there was a personal bequest to him in the will of $1,000, for which the court below was willing to give him credit in figuring the total amount of the misappropriation. In addition to this bequest, the trustee restored $1,065 on August 1, 1949, and $2,500 on August 5, 1949, and $3.53, for some reason, on October 20, 1953.

The contract to purchase the real estate was made in June of 1948, with funds withdrawn from the commingled bank account at that time. Appellant argues without the citation of adequate authority that the restored funds previously described should be credited entirely against the withdrawals made, more than a year before, for the purpose of purchasing the real estate. The Court below held that where a trust fund is involved there is no basis for the application of the first-in, first-out rule sometimes applied to commercial accounts, or any adaptation or modification of this rule. It was the lower Court's decision that where trust funds are involved the misappropriated fund should be treated as a whole, so far as repayment or restitution is concerned.

To hold otherwise would open the door to a great deal of evil. Take, for example, the case of a dishonest trustee plotting the misuse of his trust funds. It would be a simple matter for him to take, in two equal misappropriations, twice the amount he thought he needed, use the first half for his evil purpose, then restore the other half to the trust. If defendant's proposition were adopted, this process would forever bar the opportunity of tracing the remaining half into its new form, whatever it might be.

Where a trustee commingles trust funds with his personal funds the integrity of the trust funds must be maintained, and where a choice must be made between protecting his personal funds and the trust funds, the latter must be preferred

The basic question which must be faced here is: Shall this Court apply principles of law which, contrary to their purpose, provide protection to the wrongdoer and penalize the victim of his embezzlement or shall it, seeing the wrongdoing clearly established, impose the burden of establishing his rights, if any, on the guilty and resolve doubts against him, as far as possible protecting the innocent victim of the wrong?

The very statement of the question demands the wrongdoer, here Theodore T. Golden, account for his acts and disentangle the confusion he has created; establish wherein he used his own funds, wherein he used those of the Roberts Estate—or lose the entire confused mass, since that mass is insufficient to restore the full amount embezzled.

No showing at all is made by defendant on this point other than facts and arguments tending to underscore the existence of the confusion. Thus she relies on a supposition that the victim, the plaintiff below, must carry the burden of distinguishing Theodore T. Golden's funds for him in order to recover funds the same Theodore T. Golden wrongfully converted.

The law, however, is not so irrational. There is ample support for the propositions that:

1. When a trustee creates a confused mass, made up of trust funds and his personal funds, the integrity of the trust funds should be maintained to the extent possible.
2. Where, in such a situation, a choice must be made between protecting the personal funds of the trustee or the trust funds, the latter must be preferred.
3. Where, in such a situation, it is doubtful or impossible to distinguish between the two funds, the trustee has

> the burden of distinguishing that which is his own or the entire confused mass will be impressed with the trust to the extent necessary to restore the trust.

These propositions are supported in principle by *Brown* v. *Christman,* 75 App. D.C. 203, 208; 126 F. (2) 625, 630; *Boss* v. *Hardee,* 70 App. D.C. 50, 55; 103 F. (2) 751, 756; *National Bank* v. *Insuranve Co.,* 104 U.S. 54, 26 L. Ed. 693; *Oliver* v. *Piatt,* 3 How. 333, 400; and Restatement of Trusts, sec. 202, Note m.

What is found in this case is one confused mass made up of two parts: (a) the trustee's personal bank account at the American Security & Trust Co. and (b) the real estate. The record positively shows, *mainly by stipulation,* that the trustee embezzled almost $30,000.00 from the Roberts Estate and, except for a $1,000.00 bequest under the Roberts will, almost the entire amount was taken beginning when the trustee entered into the contract to buy the realty (June, 1948) and continuing through August, 1953, when he made his last payment into this same realty. *These periods coincide almost exactly.* The record also is clear that the total amount the trustee paid into the real estate during this time totalled $10,593.78.

It is submitted that the burden, in reason and in law, should have been on the party claiming under the wrongdoer who created this confused mass and, since she did not establish what part was the personal funds of the trustee, the trustee's entire contribution to the realty, $10,593.78, should have been impressed with a lien in favor of the plaintiff.

> "Unless the trust property is such that it can be ascertained and separated from the rest (i.e., that of the trustee), the entire commingled fund or property will be treated as subject to the trust, to the extent necessary to make good the claim of the cestui que trust to funds traced to, and still found commingled in, the common fund, except insofar as the trustee may

be able to distinguish and separate that which is his own." *90 C.J.S. 842* (*§ 438(a)*).

"In endeavoring to ascertain how much trust property or money went into the commingled mass, and how much was the trustee's own, every reasonable intendment should be made against the trustee through whose fault the truth in the matter has become obscure. Indeed, the rule has been followed that where the commingling is through the fault of the trustee, the entire mass will be treated as trust property or funds except insofar as the trustee may be able to distinguish what is his." *54 Am. Jur. 199* (*§ 256*).

This is not new law. The *Central Bank Case,* supra, and the cases relied on by the Supreme Court of the United States therein, go back to the very beginnings of the law in this field. The principle is enunciated by these cases thus: "If a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own."

The doctrine thus simply stated is well-established and forms the basis for the ruling of this Court in *Brown* v. *Christman,* supra and *Boss* v. *Hardee,* supra. It has also been adopted by many state Courts, including *Englar* v. *Offutt,* 70 Md. 78, 16 A. 497 and other Maryland cases. For example, in an action by the state against a clerk and his sureties to recover interest collected on the state's funds, where it was proven that the greater part of a sum deposited by the clerk (trustee) in a bank belonged to the state, but it appeared that other money might have been mingled by the clerk therewith, the burden was on the clerk (trustee) to show what part, if any, of the sum belonged to him, and on his failure to do so he became liable for the total. *Vansant* v. *State,* 53 A. 711.

In *Carleton Mining & Power Co.* v. *Railroad Co.,* 113 W. Va. 20, 166 S.E. 536, cert. den. 289 U.S. 734, 77 L. ed. 1482, the plaintiff sought to impose a trust on funds in possession of the Railroad company defendant. Defendant admitted the records were insufficient to distinguish what

funds it should be allowed to keep out of gross revenues and what part plaintiff might be entitled to (profits). The court said at page 22:

> "In this situation the rigor of the requirement of proof should not be imposed upon the plaintiff. It would be irrational and inconsistent to lay upon the plaintiff a requirement that could not be complied with because of the defendant's insufficient records. By the same token it would be equally irrational to permit the defendant to profit from that situation."

The situation is equivalent in the instant case since defendant here simply made no attempt to establish any proof of what belonged to the trustee, but simply attempted to convince the trial court that the confusion was so great as to make distinction between funds impossible.

In North Dakota, the rule is stated that it is the duty of a trustee to keep trust funds and trust property separate and distinct from his own funds and property, and where trustee mixes and confuses property or funds which he holds in trust with his own funds or property so that they cannot accurately be separated, equity imposes a trust, lien or charge on the mass for the restitution of trust property or funds commingled therein until the trust property or fund is separated from the mass, and, where such separation is not possible, until adequate restitution, in some form authorized by law, is made. *Engstrom* v. *Larson,* 77 N.D. 541, 44 N.W. 2d 97.

In the *Engstrom Case,* supra, the court also states with fundamental logic, at page 109 (of the Northwest Reporter account):

> "All the inconvenience resulting from the action of the trustee in commingling property or funds of his own with the property or funds which he held in trust are thrown on the trustee, through whose fault the resultant confusion has arisen, and he has the burden to establish his rights and to prove by clear and convincing

> evidence what part of the mass or fund belongs to him." See also *Eaton* v. *Husted*, 141 Tex. 349, 172 S.W. 2d 493, 497, 498.

Many other cases and other texts could be cited to support these rules, but it is submitted they are virtually self-evident so long as the true facts are kept in mind, and according to these principles the plaintiff is entitled to trace from the commingled bank account into the commingled realty the full sum of $10,593.78.

The lower Court was in error in denying plaintiff interest from the date on which suit was instituted to recover trust funds traced into the real estate

The case of *Spalding* v. *Mason*, 161 U.S. 375, 395, 396, was a suit in equity for an accounting that arose in the District of Columbia. On the question of interest, the United States Supreme Court said:

> ". . . Interest is allowed both at law and equity upon money due . . . It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when the payment should have been made."

This case was cited with approval by the Supreme Court in the later case of *Miller* v. *Robertson*, 266 U.S. 243, 257, wherein it was said:

> "One who has had the use of money owing to another justly may be required to pay interest from the time payment should have been made. Both in law and in equity, interest is allowed on money due."

The case of *Ascent Mining Co.* v. *Wasatch Mining Co.*, 151 U.S. 317, 323, was a suit in equity involving the enforcement of a mortgage, and the Supreme Court said:

> ". . . At all events, it is no hardship that the Ascent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between

the maturity of the mortgage and the payment into court."

In *Long* v. *Earle,* supra, a case similar on the facts, interest was allowed.

CONCLUSION

If this Honorable Court agrees with the proposition that the cestui que trust in this case would be entitled to the application of the rule providing that where a trustee wrongfully commingles trust funds with his own in one confused mass, the burden of proof is upon the trustee, or anyone claiming under him, to distinguish what is his own or lose all, then the plaintiff below is entitled to a judgment and lien in the amount of $10,593.78, and the appeal of the plaintiff in the lower Court, namely, Glens Falls Indemnity Company, should be sustained to this extent. If this Court is of the opinion that the lower Court was right in the limited tracing of trust funds which it allowed, then the judgment of the lower Court should be affirmed.

Respectfully submitted,

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Dated at
Washington, D. C.
June 14, 1957.

BRIEF FOR APPELLEE-APPELLANT GLENS FALLS INDEMNITY COMPANY

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13793 and ~~13881~~ 13801

MARY W. GOLDEN, *Appellant,*

v.

GLENS FALLS INDEMNITY COMPANY, *Appellee.*

GLENS FALLS INDEMNITY COMPANY, *Appellant,*

v.

MARY W. GOLDEN, *Appellee.*

Appeal from the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 14 1957

Joseph W. Stewart
CLERK

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Dated at
Washington, D. C.
June 14, 1957.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

1. This case involves embezzled trust funds used by a trustee to purchase real estate as a tenant by the entirety. The question is whether a dishonest trustee may forever bar a court of equity from tracing trust funds by the simple device of putting the funds in a tenancy by the entirety, rather than in some other kind of tenancy or some other place.

2. In this case the funds that were clearly traceable into the real estate were some of the earliest funds that were misappropriated. The question is whether some subsequent repayments to the trust must be regarded as replacing those first defalcations, or whether repayments should be charged against the misappropriated fund as a whole; or, stated from another point of view, whether a dishonest trustee may forever bar a court of equity from tracing trust funds by the simple device of embezzling more funds than required for his improper purposes and using the excess to refund the amounts actually used for such improper purposes.

3. There is a principle that where a trustee commingles trust funds with his personal funds, the integrity of the trust fund must be maintained at every turn, and wherever possible; and that where a choice must be made between protecting his personal funds and the trust funds, the trust funds must be preferred. The question is whether this principle is applicable to this case. If so, plaintiff would be entitled to substantially more than was awarded by the lower Court.

4. The last question is whether the plaintiff is entitled to interest on the traceable trust funds from the date suit was instituted.

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MARY W. GOLDEN, *Appellee.*

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE-APPELLANT GLENS FALLS INDEMNITY COMPANY

COUNTER-STATEMENT OF THE CASE

Theodore T. Golden qualified as Executor under the Will of one Bertha M. Roberts on March 12, 1948, giving a bond for the faithful performance of his duties as executor. (R. 180; J.A. 11). The Glens Falls Indemnity Company signed this bond as surety. (R. 180; J.A. 11). It was

adjudged by the United States District Court in the matter of the Roberts' estate, Administration No. 70431, that between April 5, 1948 and August 24, 1953, Theodore T. Golden made withdrawals from that estate and devoted these funds to his own personal use, depositing them to his personal account at the American Security and Trust Co. The total of these withdrawals was $29,644.00 (R. 181; J.A. 11).

Theodore T. Golden was removed as Executor on November 10, 1953. (R. 181; J.A. 11). He was entitled to credits against the shortage in the amount of $4,568.53 as follows: (R. 185; J.A. 15).

Bequest	$1,000.00
Repayments	
Aug. 1, 1949	1,065.00
Aug. 5, 1949	2,500.00
Oct. 20, 1953	3.53
	$4,568.53

These credits reduced the shortage to $25,075.47. (R. 181; J.A. 11). A judgment was entered against Theodore T. Golden and the Glens Falls Indemnity Co. for the sum of $25,709.37 with interest at six percent from December 8, 1953. The surety paid this judgment, which with the interest, amounted to $27,005.29, and was awarded judgment against Theodore T. Golden in that amount, plus interest at six percent. (R. 181; J.A. 11).

Theodore T. Golden married Mary W. Golden on November 12, 1947. (R. 181; J.A. 12).

On or about June 6, 1948, Theodore T. Golden and Mary W. Golden entered into a contract to purchase certain improved realty in the District of Columbia which is that realty upon which Appellees sought to impose a lien or trust in the trial of this cause, and which is the only realty mentioned herein. On the same day Theodore T.

Golden gave his personal check for $750.00 as the deposit on this contract, which was later credited as part of the purchase price. (R. 183; J.A. 13). On June 7, 1948, Theodore T. Golden as executor withdrew $2,500.00 from the Roberts Estate funds and placed them in his own personal account, commingling said estate funds with his own. On June 7, 1948, Theodore T. Golden had funds of his own on deposit amounting to $174.10. On the same day charges amounting to $23.14, and a credit of $115.00 were entered on his personal account and produced a net balance of Theodore T. Golden's own funds in the amount of $265.96 to which, also later the same day, the Roberts Estate funds ($2,500.00) were added and against which the $750.00 deposit on the realty was charged. (R. 183; 185; J.A. 13, 15, 58; Pl. Ex. 1).

Between June 7, 1948 and July 6, 1948, Theodore T. Golden made withdrawals and deposited his own funds leaving a net of $1,618.23 on deposit on July 7, 1948, and the minimum balance during said period was $1,175.86 on July 1, 1948. (J.A. 58-59; Pl. Ex. 1.)

On July 6, 1948, settlement was had on the purchase of the realty by Theodore T. Golden and Mary W. Golden, Theodore T. Golden drawing his personal check for said purpose in the amount of $5,343.78. On July 7, 1948, Theodore T. Golden, as executor, withdrew another $2,750.00 from the funds of the Roberts Estate and deposited same, along with $1,300.00 given to Theodore T. Golden by Mary W. Golden, (or a total deposit of $4,050.00) in his personal account. Theodore T. Golden's settlement check exhausted the $1,618.23 referred to in the immediately preceding paragraph and overdrew his account by $3,725.55. The deposit later that day (July 7, 1948) of $4,050.00 made the settlement check good and also left a balance of $324.45 to the credit of Theodore T. Golden. (J.A. 58, 59; Pl. Ex. 1).

Theodore T. Golden made later payments on the realty (specifically charged to his personal account on March 13,

1950; August 16, 1950; September 20, 1950; October 25, 1950; October 31, 1951; February 25, 1953; March 26, 1953; April 22, 1953; May 20, 1953 and August 28, 1953) totalling $668.66 which payments unquestionably were made with funds belonging to the Roberts Estate. (R. 185, 114; J.A. 15, 54; Pl. Exs. 1 and 2). In addition it is not disputed that Theodore T. Golden embezzled over Twenty Thousand Dollars ($20,000.00) between July 22, 1948 and August 21, 1953, and deposited these Roberts Estate funds in his own account at the American Security and Trust Company (R. 185; J.A. 15); that during the same period Theodore T. Golden paid $4,500.00 out of the same personal account into the realty in question; that he ceased paying any money into said realty August 26, 1953, and ceased embezzling from the Roberts Estate on August 21, 1953. (R. 113, 114, 185; J.A. 15, 54). Nevertheless, the trial court ruled adversely to the Glens Falls Indemnity Company as to all these later payments. (R. 59; J.A. 43).

During this entire period (1948 through 1953) Mary W. Golden had the use of the realty not only as her residence, but also to rent out rooms and to conduct a business as a seamstress. (R. 81, 182; J.A. 45, 12).

The trial court ruled that the issue before it was not how much money Mary W. Golden put into the realty but how much Theodore T. Golden put into it. (R. 181; J.A. 55).

The trial court found that Mary W. Golden had failed to sustain, by the preponderance of evidence, the allegation that she, in February, 1952, paid value for Theodore T. Golden's interest in the real estate. (R. 190; J.A. 22).

On March 11, 1955, the Glens Falls Indemnity Co. sued Theodore T. Golden and Mary W. Golden, praying (1) for a judgment in the amount of $20,000 with interest, (2) a decree that the 9th Street property was held in trust for it, (3) an order directing transfer of the property to a receiver for sale, (4) the proceeds of the sale to be applied toward its judgment against Theodore T. Golden

and to any judgment against Mary W. Golden, and for such other relief as the Court deemed proper. (R. 156-159; J.A. 1-4).

Theodore T. Golden died on August 3, 1955. (R. 168). The administrator of his estate was substituted as a defendant. (R. 186).

Trial was had without a jury before the Honorable Judge Alexander Holtzoff on January 17 and 18, 1957. (R. 1-127). On January 18, 1957, the Court denied the motion of defendant, Mary W. Golden, for judgment at the close of the plaintiff's case. (R. 66). On January 22, 1957, the Court gave its opinion with findings of fact and conclusions of law, awarding the Glens Falls Indemnity Company a lien on the property involved herein in the amount of $3,434.78. (R. 121-126; J.A. 16-19). On January 30, 1957, after hearing the motion of Mary W. Golden to make amended and additional findings of fact and conclusions of law, Judge Holtzoff granted it in part and denied it in part and adjusted his findings and conclusions accordingly. (R. 128-137; J.A. 23-28). He entered judgment for the plaintiff as indicated above on January 30, 1957. (R. 192; J.A. 29).

The trial court ruled against the Glens Falls Indemnity Co. on the question of interest which was claimed on the amount of the judgment from March 11, 1955, when the Complaint was filed. (R. 136; J.A. 28).

SUMMARY OF ARGUMENT

I

This proceeding involves trust funds that were commingled by a trustee with his personal funds and later misappropriated. The effort of the plaintiff was to trace as much of those funds as possible into real estate purchased by the trustee under a tenancy by the entirety with his wife.

The lower Court allowed a limited tracing of the misappropriated funds, but only those funds which could be clearly identified or earmarked as having come out of the trust estate account in one bank, into the commingled account in another bank, and thence almost simultaneously into the original purchase of the real estate.

II

Plaintiff's position is that the Court was correct in allowing this limited tracing of funds, and thus rejecting the idea that a tenancy by the entirety bars the tracing of trust funds. But we feel the lower Court should have gone farther and held that plaintiff should have credit for all funds withdrawn from the wrongfully commingled account and placed in the real estate. This on the theory that where trust funds are wrongfully commingled with personal funds, and the commingled account is later exhausted, such funds as can be traced out of the commingled account into real estate should be deemed to be trust funds.

III

The defendant in the lower Court attempted to show that no tracing of funds should be allowed because on a date nearly four years subsequent to the original purchase the trustee's wife undertook to acquire his share of the tenancy by the return of some worthless stock she had purchased from him several years before. The argument was that this made her a bona fide purchaser for value of the trustee's share of the tenancy. The only testimony in support of this alleged transaction was the oral testimony of the wife (defendant) in the lower Court. The Court found that this oral testimony was not sufficient to demonstrate by a preponderance of the evidence that defendant was a bona fide purchaser for value of the trustee's interest in the tenancy. There would be no ground for disturbing this finding on appeal.

IV

Having held that plaintiff was entitled to trace a limited amount of the trust funds, the lower Court should have allowed interest on that amount from the time of demand, namely, from the date suit was instituted. This would be in keeping with the rule that a trust should be restored to the fullest extent possible.

ARGUMENT

To hold that a trustee could permanently bar a Court from tracing trust funds by the mere device of placing the funds in a tenancy by the entirety would be contrary to public policy

The main argument advanced by appellant is that a tenancy by the entirety is unassailable, even for the purpose of tracing trust funds. This argument was rejected by the lower Court on the basis of early United States Supreme Court decisions, and properly so. In the case of *Oliver* v. *Piatt,* 3 How. 333, 400, decision by Mr. Justice Story, the facts were similar to those presented here in that they involved tracing of trust funds into the purchase o real estate. In that case, the Court laid down the rule that:

> "It is a clearly established principle that whenever the trustee has been guilty of a breach of the trust, and has transferred property, by sale or otherwise, to any third person, the cestui que trust has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a bona fide purchaser for a valuable consideration, without notice. If the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the cestui que trust has his election either to follow the same into the new investment or to hold the trustee personally liable for the breach of the trust."

Another decision of the United States Supreme Court to the same effect is *Central National Bank* v. *Connecticut Life Insurance Co.,* 104 U.S. 54, 26 L. Ed. 693 (1881), in which the Court discusses the doctrine of tracing trust

assets from its origins in the English law and has set forth most of the fundamental rules on this subject which have been applied by the courts since that time. One of the English cases discussed at length and cited with approval by the Supreme Court is *Pennell* v. *Deffell,* 4 DeG. M. & G., 372, 388, where the Court said:

> "It is . . . an undoubted principle of this court, that as between *cestui que trust* and trustee and all parties claiming under the trustee, otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or in its altered state, continues to be subject to or affected by the trust."

Having quoted the above case with approval, the Supreme Court then states:

> "This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in this court.

A case squarely in point on the facts is the case of *Long* v. *Earle,* 277 Mich. 505, 269 N.W. 577, in which the same defense was interposed, namely, that trust funds could not be traced into a tenancy by the entirety. The Court there adopted the following language:

> "'Where a husband used trust property and invested it in real estate taking title to himself and wife as tenants by the entireties, and he died, and she, as survivor, took title thereto and sold the property on an executory contract presumaly for part cash and part on time payments, she then held, either in cash or in an interest in the contract, property equitably belonging to the plaintiff, for which she had paid no consideration and to which she had no right, and upon

which she had no equitable claim. *Watson* v. *Wagner*, 202 Mich. 397, 168 N.W. 428, 430.' "

The opinion then points up a basic lack of logic in the contention that the tenancy by the entireties is beyond reach. For the effect of such a holding would be that the trustee, by retaining an interest in entirety would put out of reach property which undoubtedly could be recovered even if he had placed *exclusive* ownership in his wife (without adequate consideration).

In another case very much like that before this Court, *Wilkins* v. *Wilkins*, 144 Fla. 590, 198 So. 335, it was stated at page 337:

> "It is elementary that where trust funds are traceable into any particular property in the hands of the trustee, a lien will be impressed upon that property to the extent of the trust fund traced thereto.
>
> "The contention is made that because the deed to the property into which the trust fund was traced conveyed the property as an estate by the entireties to J. S. Wilkins and wife, the lien could not be impressed upon that property. The fallacy of this is that the trust was impressed in the very transaction in which the conveyance was acquired and, therefore, J. S. Wilkins and wife took the property as an estate by the entireties impressed with a lien to the extent of the trust fund which went into the payment for that property."

There is no probative evidence in this case indicating that appellant was a bona fide purchaser for value

The argument is made that subsequent to the creation by the trustee and his wife of the tenancy by the entirety, she became a bona fide purchaser for value of his share of the tenancy. The lower Court found that this proposition was not sustained by a preponderance of the evidence.

In an effort to make herself out a bona fide purchaser for value, defendant undertook to testify that by oral agree-

ment, between herself and the trustee (her husband), she returned certain worthless stock to him in return for his interest in the tenancy. The stock was in an organization known as Golden Distributors, Inc., organized by the trustee to deal in oil wells, and was not shown to have any value. Aside from this, there was nothing on the face of the certificates to indicate that the stock had ever been transferred to the trustee in return for his interest in the tenancy. The lower Court felt that there was nothing of substance to corroborate the oral testimony of appellant on this subject, and thus correctly found against defendant on this point.

Defendant's oral testimony on this point was that when she bought the stock in Golden Distributors, Inc., from the trustee, who later became her husband, it was agreed that he would take the stock back if it proved to be of no value; in other words, that he had a pre-existing obligation to take the stock off her hands. By returning the stock under these conditions defendant would not become a bona fide purchaser for value, and here we emphasize the word value. It has been held that where a trustee transfers trust property in consideration of the extinguishment of a pre-existing debt or other obligation, the transfer is not for value. *Restatement of Law of Trusts* (American Law Institute), page 931, section 304; Pomeroy, Fifth Edition, Volume 3, Section 748. *Knapp* v. *First National Bank,* 154 F. 2d 395, 399 (C.C.A. 10), *Johnson* v. *Robinson,* 203 F. 2d 135, 136 (C.C.A. 5). In this connection, it should also be borne in mind that one who claims, especially in real estate transactions, the characteristics of a bona fide purchaser for value has the burden of proof of sustaining this affirmative defense. *Wright-Blodgett Co.* v. *United States,* 236 U.S. 397, 403, 59 L. Ed. 637.

Even if there were more probative evidence to support defendant's position on this point, it would not be adequate as a matter of law.

A cestui que trust should not be prohibited from tracing trust funds merely because the trustee may have restored some of the money and thereby reduced the net amount of the misappropriation

In this case the total defalcation was $29,644.00 of which the trustee restored $4,568.53. The defaulting trustee was an executor under a will, and there was a personal bequest to him in the will of $1,000, for which the court below was willing to give him credit in figuring the total amount of the misappropriation. In addition to this bequest, the trustee restored $1,065 on August 1, 1949, and $2,500 on August 5, 1949, and $3.53, for some reason, on October 20, 1953.

The contract to purchase the real estate was made in June of 1948, with funds withdrawn from the commingled bank account at that time. Appellant argues without the citation of adequate authority that the restored funds previously described should be credited entirely against the withdrawals made, more than a year before, for the purpose of purchasing the real estate. The Court below held that where a trust fund is involved there is no basis for the application of the first-in, first-out rule sometimes applied to commercial accounts, or any adaptation or modification of this rule. It was the lower Court's decision that where trust funds are involved the misappropriated fund should be treated as a whole, so far as repayment or restitution is concerned.

To hold otherwise would open the door to a great deal of evil. Take, for example, the case of a dishonest trustee plotting the misuse of his trust funds. It would be a simple matter for him to take, in two equal misappropriations, twice the amount he thought he needed, use the first half for his evil purpose, then restore the other half to the trust. If defendant's proposition were adopted, this process would forever bar the opportunity of tracing the remaining half into its new form, whatever it might be.

Where a trustee commingles trust funds with his personal funds the integrity of the trust funds must be maintained, and where a choice must be made between protecting his personal funds and the trust funds, the latter must be preferred

The basic question which must be faced here is: Shall this Court apply principles of law which, contrary to their purpose, provide protection to the wrongdoer and penalize the victim of his embezzlement or shall it, seeing the wrongdoing clearly established, impose the burden of establishing his rights, if any, on the guilty and resolve doubts against him, as far as possible protecting the innocent victim of the wrong?

The very statement of the question demands the wrongdoer, here Theodore T. Golden, account for his acts and disentangle the confusion he has created; establish wherein he used his own funds, wherein he used those of the Roberts Estate—or lose the entire confused mass, since that mass is insufficient to restore the full amount embezzled.

No showing at all is made by defendant on this point other than facts and arguments tending to underscore the existence of the confusion. Thus she relies on a supposition that the victim, the plaintiff below, must carry the burden of distinguishing Theodore T. Golden's funds for him in order to recover funds the same Theodore T. Golden wrongfully converted.

The law, however, is not so irrational. There is ample support for the propositions that:

1. When a trustee creates a confused mass, made up of trust funds and his personal funds, the integrity of the trust funds should be maintained to the extent possible.
2. Where, in such a situation, a choice must be made between protecting the personal funds of the trustee or the trust funds, the latter must be preferred.
3. Where, in such a situation, it is doubtful or impossible to distinguish between the two funds, the trustee has

> the burden of distinguishing that which is his own or the entire confused mass will be impressed with the trust to the extent necessary to restore the trust.

These propositions are supported in principle by *Brown* v. *Christman,* 75 App. D.C. 203, 208; 126 F. (2) 625, 630; *Boss* v. *Hardee,* 70 App. D.C. 50, 55; 103 F. (2) 751, 756; *National Bank* v. *Insuranve Co.,* 104 U.S. 54, 26 L. Ed. 693; *Oliver* v. *Piatt,* 3 How. 333, 400; and Restatement of Trusts, sec. 202, Note m.

What is found in this case is one confused mass made up of two parts: (a) the trustee's personal bank account at the American Security & Trust Co. and (b) the real estate. The record positively shows, *mainly by stipulation,* that the trustee embezzled almost $30,000.00 from the Roberts Estate and, except for a $1,000.00 bequest under the Roberts will, almost the entire amount was taken beginning when the trustee entered into the contract to buy the realty (June, 1948) and continuing through August, 1953, when he made his last payment into this same realty. *These periods coincide almost exactly.* The record also is clear that the total amount the trustee paid into the real estate during this time totalled $10,593.78.

It is submitted that the burden, in reason and in law, should have been on the party claiming under the wrongdoer who created this confused mass and, since she did not establish what part was the personal funds of the trustee, the trustee's entire contribution to the realty, $10,593.78, should have been impressed with a lien in favor of the plaintiff.

> "Unless the trust property is such that it can be ascertained and separated from the rest (i.e., that of the trustee), the entire commingled fund or property will be treated as subject to the trust, to the extent necessary to make good the claim of the cestui que trust to funds traced to, and still found commingled in, the common fund, except insofar as the trustee may

be able to distinguish and separate that which is his own." *90 C.J.S. 842* (*§ 438(a)*).

"In endeavoring to ascertain how much trust property or money went into the commingled mass, and how much was the trustee's own, every reasonable intendment should be made against the trustee through whose fault the truth in the matter has become obscure. Indeed, the rule has been followed that where the commingling is through the fault of the trustee, the entire mass will be treated as trust property or funds except insofar as the trustee may be able to distinguish what is his." *54 Am. Jur. 199* (*§ 256*).

This is not new law. The *Central Bank Case,* supra, and the cases relied on by the Supreme Court of the United States therein, go back to the very beginnings of the law in this field. The principle is enunciated by these cases thus: "If a man mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own."

The doctrine thus simply stated is well-established and forms the basis for the ruling of this Court in *Brown* v. *Christman,* supra and *Boss* v. *Hardee,* supra. It has also been adopted by many state Courts, including *Englar* v. *Offutt,* 70 Md. 78, 16 A. 497 and other Maryland cases. For example, in an action by the state against a clerk and his sureties to recover interest collected on the state's funds, where it was proven that the greater part of a sum deposited by the clerk (trustee) in a bank belonged to the state, but it appeared that other money might have been mingled by the clerk therewith, the burden was on the clerk (trustee) to show what part, if any, of the sum belonged to him, and on his failure to do so he became liable for the total. *Vansant* v. *State,* 53 A. 711.

In *Carleton Mining & Power Co.* v. *Railroad Co.,* 113 W. Va. 20, 166 S.E. 536, cert. den. 289 U.S. 734, 77 L. ed. 1482, the plaintiff sought to impose a trust on funds in possession of the Railroad company defendant. Defendant admitted the records were insufficient to distinguish what

funds it should be allowed to keep out of gross revenues and what part plaintiff might be entitled to (profits). The court said at page 22:

> "In this situation the rigor of the requirement of proof should not be imposed upon the plaintiff. It would be irrational and inconsistent to lay upon the plaintiff a requirement that could not be complied with because of the defendant's insufficient records. By the same token it would be equally irrational to permit the defendant to profit from that situation."

The situation is equivalent in the instant case since defendant here simply made no attempt to establish any proof of what belonged to the trustee, but simply attempted to convince the trial court that the confusion was so great as to make distinction between funds impossible.

In North Dakota, the rule is stated that it is the duty of a trustee to keep trust funds and trust property separate and distinct from his own funds and property, and where trustee mixes and confuses property or funds which he holds in trust with his own funds or property so that they cannot accurately be separated, equity imposes a trust, lien or charge on the mass for the restitution of trust property or funds commingled therein until the trust property or fund is separated from the mass, and, where such separation is not possible, until adequate restitution, in some form authorized by law, is made. *Engstrom* v. *Larson,* 77 N.D. 541, 44 N.W. 2d 97.

In the *Engstrom Case,* supra, the court also states with fundamental logic, at page 109 (of the Northwest Reporter account):

> "All the inconvenience resulting from the action of the trustee in commingling property or funds of his own with the property or funds which he held in trust are thrown on the trustee, through whose fault the resultant confusion has arisen, and he has the burden to establish his rights and to prove by clear and convincing

evidence what part of the mass or fund belongs to him." See also *Eaton* v. *Husted,* 141 Tex. 349, 172 S.W. 2d 493, 497, 498.

Many other cases and other texts could be cited to support these rules, but it is submitted they are virtually self-evident so long as the true facts are kept in mind, and according to these principles the plaintiff is entitled to trace from the commingled bank account into the commingled realty the full sum of $10,593.78.

The lower Court was in error in denying plaintiff interest from the date on which suit was instituted to recover trust funds traced into the real estate

The case of *Spalding* v. *Mason,* 161 U.S. 375, 395, 396, was a suit in equity for an accounting that arose in the District of Columbia. On the question of interest, the United States Supreme Court said:

> ". . . Interest is allowed both at law and equity upon money due . . . It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when the payment should have been made."

This case was cited with approval by the Supreme Court in the later case of *Miller* v. *Robertson,* 266 U.S. 243, 257, wherein it was said:

> "One who has had the use of money owing to another justly may be required to pay interest from the time payment should have been made. Both in law and in equity, interest is allowed on money due."

The case of *Ascent Mining Co.* v. *Wasatch Mining Co.,* 151 U.S. 317, 323, was a suit in equity involving the enforcement of a mortgage, and the Supreme Court said:

> ". . . At all events, it is no hardship that the Ascent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between

the maturity of the mortgage and the payment into court."

In *Long* v. *Earle,* supra, a case similar on the facts, interest was allowed.

CONCLUSION

If this Honorable Court agrees with the proposition that the cestui que trust in this case would be entitled to the application of the rule providing that where a trustee wrongfully commingles trust funds with his own in one confused mass, the burden of proof is upon the trustee, or anyone claiming under him, to distinguish what is his own or lose all, then the plaintiff below is entitled to a judgment and lien in the amount of $10,593.78, and the appeal of the plaintiff in the lower Court, namely, Glens Falls Indemnity Company, should be sustained to this extent. If this Court is of the opinion that the lower Court was right in the limited tracing of trust funds which it allowed, then the judgment of the lower Court should be affirmed.

Respectfully submitted,

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